HIGH COURT OF AUSTRALIA

TOOHEY, GAUDRON, McHUGH, GUMMOW AND KIRBY JJ

PHILIP PETERS APPELLANT

AND

THE QUEEN RESPONDENT

Peters v The Queen (M6-97) [1998] HCA 7
2 February 1998

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Victoria

Representation:

P G Priest for the appellant (instructed by Jonathan Kemp & Associates)

B R Martin QC with N T Robinson for the respondent (instructed by M White, Solicitor to the Commonwealth Director of Public Prosecutions)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Peters v The Queen

Criminal law – Conspiracy to defraud – Elements of – Whether dishonesty an essential element – Tests of dishonesty in *R v Ghosh* and *R v Salvo* – Actus reus and mens rea – Agreement to use dishonest means – Intention to prejudice or imperil the rights or interest of others – Direction to jury.

Crimes Act 1914 (Cth), ss 86(1)(e) and 86A.

1 TOOHEY AND GAUDRON JJ. The appellant, a solicitor, stood trial in the County Court of Victoria on charges of conspiracy to defraud the Commonwealth pursuant to ss 86(1)(e) and 86A of the *Crimes Act* 1914 (Cth) ("the Act") and a charge of conspiracy to pervert the course of justice. He was acquitted of the latter charge but convicted of conspiracy to defraud. His appeal against conviction was dismissed by the Court of Appeal (Criminal Division) of the Supreme Court of Victoria. The appellant now appeals to this Court.

The facts

2 In 1983, the appellant was retained by Mr Spong to act in certain transactions involving the purchase of five blocks of land at Essendon in Victoria. One block, which had a substantial residence on it, was purchased in the name of Jetoline Pty Limited ("Jetoline"). The appellant was a director of and a shareholder in Jetoline. The other director was "Freeman", a name which the appellant knew to be an alias for Spong. It is unclear whether the other blocks were also purchased in the name of Jetoline. It is not in issue that Spong was involved in illegal drug trafficking and that he arranged to purchase and, in fact, purchased the Essendon properties with moneys obtained from his drug dealings. This notwithstanding, it follows from the appellant's acquittal on the charge of conspiracy to pervert the course of justice that it must be taken that he was ignorant of the source of those moneys[1].

3 Although Spong provided the whole of the purchase moneys for the Essendon properties, that fact was concealed by the execution of two sham mortgage documents. One was a memorandum of mortgage over the block of land on which was erected the residence earlier referred to. That "mortgage" was in favour of a person named Rosenberg - another alias used by Spong. The other was a "mortgage" over all five blocks of land in favour of Dial Financial Services Pty Ltd ("Dial"). The appellant acted for the purchaser/mortgagor in relation to that "mortgage" and another solicitor acted for Dial. No money was advanced under either "mortgage". The solicitor acting for Dial was unable to register the "mortgage" to that company and a caveat was lodged to protect its interests. Later, the blocks of land other than that on which the residence was erected were sold to genuine purchasers. On settlement, part or all of the proceeds of each sale were paid to Dial, with Dial executing a withdrawal of caveat to enable the registration

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1 The prosecution case on the charge of conspiracy to pervert the course of justice was that the appellant was party to a conspiracy to conceal the true source of the moneys used to purchase the various properties the subject of the conveyancing transactions in which the appellant was retained.

of a transfer to the purchaser concerned. The moneys paid to Dial were then paid back to Spong.

The issues at trial

4 So far as concerns the charge of conspiracy to defraud the Commonwealth, the prosecution case was that the appellant was party to an agreement to conceal the true amount of Spong's income by sham mortgage transactions and that he and his fellow conspirators intended thereby to deprive the Commissioner of Taxation ("the Commissioner") of tax payable on that income. The appellant gave evidence admitting that, at some stage, he was informed by Spong that no moneys had been advanced by Dial under the mortgage, and that the moneys paid to Dial, apparently in partial discharge of its mortgage, were in fact returned to Spong. However, he said he was not party to any agreement to conceal Spong's income by sham mortgage transactions or to deprive the Commissioner of tax payable on that income. He was, he said, merely acting as Spong's solicitor.

5 In his summing up to the jury, the trial judge outlined the prosecution and defence cases and explained the offence of conspiracy to defraud. As part of that explanation, the jury was instructed that it was necessary for the prosecution to prove that the appellant was dishonest. Directions were given in line with the decision of the English Court of Appeal in *R v Ghosh*[2], the jury being instructed that they had to be satisfied that what the appellant agreed to do was dishonest by the current standards of ordinary and reasonable honest people and, if it was, that the appellant must have realised it was dishonest by those standards.

The argument on appeal

6 The appellant contends in this Court, as he did in the Court of Appeal, that the trial judge misdirected the jury as to the test of dishonesty. In this regard, it is put that the jury should have been instructed to apply a subjective test in accordance with the decision of the Full Court of the Supreme Court of Victoria in *R v Salvo*[3] and not the test adopted in *Ghosh*[4]. More precisely, it is put that the jury should have been instructed that the prosecution had to prove "an absence of belief [on the appellant's part] that he had a legal right to do what he did". However, the appellant's belief in that regard was not in issue at the trial. His case

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2 [1982] QB 1053.

3 [1980] VR 401.

4 [1982] QB 1053.

was simply that he was not a party to the conspiracy alleged, rather than that he did not act "dishonestly".

7 To understand the appellant's argument, it is necessary to say something of the offence of conspiracy to defraud the Commonwealth. It is a statutory offence created by the Act which, at relevant times, provided, firstly in s 86(1)(e)[5] and later in s 86A[6], that a person who conspired with another "to defraud the Commonwealth or a public authority under the Commonwealth" was guilty of an indictable offence[7]. There being no express provision as to the elements of that offence, it is to be taken that s 86(1)(e) and, later, s 86A enacted the substance of the common law offence of conspiracy to defraud in its application to fraudulent agreements the intended victim of which was the Commonwealth or one or more of its public authorities.

8 The appellant's argument assumes that dishonesty is an element of the common law offence of conspiracy to defraud and, thus, of the offence of conspiracy to defraud the Commonwealth. As will later appear, that assumption is correct in the sense that dishonesty is a characteristic of the means agreed to be employed to effect the fraud and is also descriptive of what is involved in fraud. However, the assumption is not correct in the sense that dishonesty is a separate element of the offence. The difficulty which emerges in this case is partly due to the failure to appreciate that dishonesty is not a separate element and partly due to the different tests of dishonesty which have been adopted in the decided cases.

The tests of dishonesty in *Ghosh* and in *Salvo*

9 The issue in *Ghosh*[8] was the test of dishonesty for the offence of dishonest appropriation by deception contrary to s 1 of the *Theft Act* 1968 (UK)

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5 Until 24 October 1984. By s 3 and sch 1 of the *Statute Law (Miscellaneous Provisions) Act (No 2)* 1984 (Cth), s 86(1)(e) was omitted and replaced by s 86A.

6 Until 14 September 1995. By s 8 of the *Crimes Amendment Act* 1995 (Cth), s 86A together with s 86 were repealed and replaced by a new s 86.

7 Note that the offence of conspiracy to defraud the Commonwealth now derives from the combined operation of ss 86 and 29D of the Act. Section 86(1) provides that "[a] person who conspires with another person to commit an offence against a law of the Commonwealth punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence". And by s 29D, a person who defrauds the Commonwealth or a public authority under the Commonwealth is guilty of an indictable offence punishable by 1,000 penalty units or imprisonment for 10 years, or both.

8 [1982] QB 1053.

("the Theft Act"). In that case, a number of earlier cases, including *R v Scott*[9] and *R v Landy*[10], were referred to in support of the proposition that "the test for dishonesty ... should be the same whether the offence charged be theft or conspiracy to defraud."[11] The Court of Appeal declined to apply the subjective test which had been applied in some earlier cases under the Theft Act[12], namely, whether the accused believed his or her actions to be honest, and adopted, instead, the test which formed the basis of the trial judge's direction in this case.

10 The test adopted in *Ghosh*, namely, whether the acts in question were dishonest according to current standards of ordinary decent people and, if so, whether the accused must have realised that they were dishonest by those standards[13] has its origins in *R v Feely*[14]. That, too, was a case of dishonest appropriation contrary to s 1 of the Theft Act. It was held in *Feely* that the question of dishonesty was for the jury and, as "dishonesty" was a word in ordinary use, it was unnecessary for the trial judge to explain what it meant. Further, it was said that it was for the jury to decide whether the act involved was dishonest by application of "the current standards of ordinary decent people."[15]

11 The test of dishonesty adopted in *Salvo*[16] was whether the accused believed he had a legal right to the property in question. In that case, the accused was charged with dishonestly obtaining a motor vehicle by deception contrary to s 81(1) of the *Crimes Act* 1958 (Vic) ("the Crimes Act"), one of a number of provisions in that Act based on the Theft Act. In his defence, the accused asserted his belief that he had a legal right to possession of the vehicle concerned.

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9 [1975] AC 819.

10 [1981] 1 WLR 355.

11 [1982] QB 1053 at 1059. Cf *R v McIvor* [1982] 1 WLR 409 in which it was held that a subjective test was to be applied for conspiracy to defraud and an objective test for theft.

12 See, for example, *R v Greenstein* [1975] 1 WLR 1353 and *R v Waterfall* [1970] 1 QB 148. See also *R v Royle* [1971] 1 WLR 1764.

13 [1982] QB 1053 at 1064.

14 [1973] QB 530.

15 [1973] QB 530 at 538.

16 [1980] VR 401.

12 In *Salvo*, Murphy J expressed the view that "the word 'dishonestly' is clearly used in a special sense in s 81(1) of the *Crimes Act*"[17] and that "*R v Feely*[18] ... ought not to be applied ... if it means that the judge should not tell the jury anything about the word 'dishonestly'."[19] Fullager J likewise thought that dishonesty was used in a special sense and expressed the view that it "imports that the accused person must obtain the property [in question] ... without any belief that he has in law the right to deprive the other of [it]."[20] His Honour also described the interpretation of "dishonestly" in *R v Feely* as "unworkable"[21].

13 The approach adopted in *Salvo* was followed in Victoria in *R v Brow*[22] and *R v Bonollo*[23], both cases involving charges of dishonestly obtaining by deception under s 81(1) of the Crimes Act. It was followed in New South Wales in *R v Love*[24], another case involving a charge of dishonestly obtaining by deception[25], and in *Condon*[26], a case involving a charge of defrauding the Commonwealth under s 29D of the Act. In each of the two last mentioned cases, the accused asserted a belief that he was legally entitled to the property or money in question.

14 In the present case, the Court of Appeal held that, notwithstanding the decision of the New South Wales Court of Appeal in *Condon*[27], the subjective test adopted in *R v Salvo* has no application to Commonwealth offences involving

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17 [1980] VR 401 at 422.

18 [1973] QB 530.

19 [1980] VR 401 at 423.

20 [1980] VR 401 at 440.

21 [1980] VR 401 at 439.

22 [1981] VR 783.

23 [1981] VR 633.

24 (1989) 17 NSWLR 608.

25 See s 178BA of the *Crimes Act* 1900 (NSW).

26 (1995) 83 A Crim R 335.

27 (1995) 83 A Crim R 335.

fraudulent conduct[28]. It did so on the basis that the application of a subjective test would be inconsistent with its earlier decision in *R v Lawrence*[29], with dicta in other cases decided in Victoria[30] and with the course of authority in Queensland[31], South Australia[32] and Western Australia[33].

Dishonesty

15 There is a degree of incongruity in the notion that dishonesty is to be determined by reference to the current standards of ordinary, honest persons and the requirement that it be determined by asking whether the act in question was dishonest by those standards and, if so, whether the accused must have known that that was so. That incongruity comes about because ordinary, honest persons determine whether a person's act is dishonest by reference to that person's knowledge or belief as to some fact relevant to the act in question or the intention with which the act was done. They do not ask whether he or she must be taken to have realised that the act was dishonest by the standards of ordinary, honest persons. Thus, for example, the ordinary person considers it dishonest to assert as true something that is known to be false. And the ordinary person does so simply because the person making the statement knows it to be false, not because he or she must be taken to have realised that it was dishonest by the current standards of ordinary, honest persons.

16 There are also practical difficulties involved in the *Ghosh* test. Those difficulties arise because, in most cases where honesty is in issue, the real question is whether an act was done with knowledge or belief of some specific thing or with some specific intent, not whether it is properly characterised as dishonest. To take a simple example: there is ordinarily no question whether the making of a false statement with intent to deprive another of his property is dishonest. Rather, the

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28 Note that in *R v Harris* unreported, Court of Appeal of Victoria, 13 February 1997, the Court of Appeal again held that the subjective test in *Salvo* did not apply to a fraud offence, this offence charged pursuant to s 29D of the *Crimes Act* 1914 (Cth).

29 [1997] 1 VR 459.

30 See *R v Smart* [1983] 1 VR 265 at 294-295; *R v Walsh and Harney* [1984] VR 474 at 478 per Young CJ (with whom Murray J agreed); *R v Edwards* [1988] VR 481 at 489 per Young CJ.

31 See *R v Maher* [1987] 1 Qd R 171.

32 See *R v Aston and Burnell* (1987) 44 SASR 436.

33 See *Cornelius & Briggs* (1988) 34 A Crim R 49. See also *Turner v Campbell* (1987) 88 FLR 410.

question is usually whether the statement was made with knowledge of its falsity and with intent to deprive. Of course, there may be unusual cases in which there is a question whether an act done with knowledge of some matter or with some particular intention is dishonest. Thus, for example, there may be a real question whether it is dishonest, in the ordinary sense, for a person to make a false statement with intent to obtain stolen property from a thief and return it to its true owner.

17 The practical difficulties with the *Ghosh* test arise both in the ordinary case where the question is whether an act was done with knowledge or belief of some specific matter or with some specific intent and in the unusual case where the question is whether an act done with some particular knowledge, belief or intent is to be characterised as dishonest. In the ordinary case, the *Ghosh* test distracts from the true factual issue to be determined; in the unusual case, it conflates what really are two separate questions, namely, whether they are satisfied beyond reasonable doubt that the accused had the knowledge, belief or intention which the prosecution alleges and, if so, whether, on that account, the act is to be characterised as dishonest. In either case, the test is likely to confuse rather than assist in deciding whether an act was or was not done dishonestly.

18 In a case in which it is necessary for a jury to decide whether an act is dishonest, the proper course is for the trial judge to identify the knowledge, belief or intent which is said to render that act dishonest and to instruct the jury to decide whether the accused had that knowledge, belief or intent and, if so, to determine whether, on that account, the act was dishonest. Necessarily, the test to be applied in deciding whether the act done is properly characterised as dishonest will differ depending on whether the question is whether it was dishonest according to ordinary notions or dishonest in some special sense. If the question is whether the act was dishonest according to ordinary notions, it is sufficient that the jury be instructed that that is to be decided by the standards of ordinary, decent people. However, if "dishonest" is used in some special sense in legislation creating an offence, it will ordinarily be necessary for the jury to be told what is or, perhaps, more usually, what is not meant by that word. Certainly, it will be necessary for the jury to be instructed as to that special meaning if there is an issue whether the act in question is properly characterised as dishonest[34].

19 The question whether any and, if so, what direction should have been given to the jury with respect to dishonesty in this case must be answered by reference to the elements of the offence of conspiracy to defraud and the issues which arose in the trial. However, it follows from what has been said that it was not appropriate for the jury to be instructed in accordance with the test adopted in *Ghosh*. It also follows that it was not appropriate for it to be instructed in accordance with the test

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34 As in *Salvo*.

in *Salvo*, a case concerned with an offence against a statutory provision in which, as earlier noted, the word "dishonest" was held to have been used in a special sense.

Dishonesty and the offence of conspiracy to defraud

20 There are difficulties in the path of an exhaustive statement as to what is involved in the offence of conspiracy to defraud - difficulties which are largely referable to "[h]uman ingenuity in devising dishonest schemes designed to produce an advantage to one person at the expense of another or of the community at large"[35]. Those difficulties have resulted in a "great reluctance amongst lawyers to attempt to define fraud"[36]. Even so, Buckley J attempted a definition in *In re London and Globe Finance Corporation Limited*, defining "to defraud" by reference to "deceit" in these terms[37]:

> "To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action."

As will be seen, that definition is not exhaustive.

21 The deficiency in the definition attempted in *In re London and Globe Finance Corporation Limited*[38] emerged in *R v Scott*[39]. It was argued in that case that an agreement with persons employed by the owners of certain cinema theatres to temporarily remove cinematograph films from their possession so that unauthorised copies could be made of those films did not involve any deception of the cinema owners and, thus, did not constitute a conspiracy to defraud. The argument was rejected, it being said by Viscount Dilhorne that where the intended victim is a private individual or corporation, as distinct from a public official or public authority, "'to defraud' ordinarily means ... to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled"[40] (emphasis added). The clear focus of

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35 *R v Kastratovic* (1985) 42 SASR 59 at 62 per King CJ.

36 Stephen, *A History of the Criminal Law of England*, (1883), vol 2 at 121.

37 [1903] 1 Ch 728 at 732-733.

38 [1903] 1 Ch 728.

39 [1975] AC 819.

40 [1975] AC 819 at 839.

that statement is that, for an agreement to constitute a conspiracy to defraud, it must be an agreement to bring about a result by dishonest means - means which, as that case decides, do not necessarily involve deception.

22 The need for the employment of dishonest means, not necessarily deception, also emerges in the speech of Lord Diplock in *R v Scott*. His Lordship observed:

> "Where the intended victim of a 'conspiracy to defraud' is a private individual the purpose of the conspirators must be to cause the victim economic loss by depriving him of some property or right, corporeal or incorporeal, to which he is or would or might become entitled. The intended means by which the purpose is to be achieved must be dishonest. They need not involve fraudulent misrepresentation such as is needed to constitute the civil tort of deceit. Dishonesty of any kind is enough."[41] (emphasis added)

There are difficulties with Lord Diplock's statement in so far as it purports to define the offence of conspiracy to defraud in terms of the purpose of the conspiracy. That is a matter to which it will be necessary to return.

23 Since *R v Scott*, the view has developed that dishonesty is a separate and distinct element of the offence of conspiracy to defraud and must be proved as such. The contrary view, as stated by the authors of *Archbold*, is that "the word 'dishonestly' adds nothing to the definition of fraud" and that, in cases of conspiracy to defraud, it is "superfluous" to direct a jury with respect to dishonesty[42]. The view that it is superfluous has been rejected by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General. In a footnote to their report on Conspiracy to Defraud[43], the Officers state:

> "... to say that dishonesty is superfluous in the offence of conspiracy to defraud, and that an intent to inflict an economic loss on another or to imperil such an interest is sufficient fault element to constitute conspiracy to defraud is far too broad. It would mean that legitimate business competition where loss to a competitor is intended or contemplated amounts to conspiracy to

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41 [1975] AC 819 at 841.

42 *Archbold Criminal Pleading, Evidence and Practice*, (1996), vol 2 at 17-102.

43 Australia, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code. Chapter 3: Conspiracy to Defraud Report*, (May 1997) at 5, footnote 11.

> defraud. Dishonesty is an essential element of conspiracy to defraud, especially in a case where there is no deceit."

The Officers also assert in that footnote that the view that dishonesty is an essential element of conspiracy to defraud is confirmed by the recent decisions of the Privy Council in *Wai Yu-Tsang v The Queen*[44] and *Adams v The Queen*[45].

24 The contention of the Model Criminal Code Officers Committee fails, in our view, to pay sufficient regard to the elements of the offence of fraud. First, it overlooks the need for the use of dishonest means or, more precisely in the context of conspiracy to defraud, the need for there to be an agreement to use dishonest means. And it also pays insufficient regard to the consideration that fraud involves an element of dishonesty over and above the use of dishonest means. Before turning to these issues, however, it is convenient to direct attention to some matters which, if not mentioned, might result in other misunderstandings with respect to the offence of conspiracy to defraud.

25 The first matter which should be mentioned is that, contrary to what was said by Lord Diplock in *R v Scott*, the offence of conspiracy to defraud is not limited to an agreement involving an intention to cause economic loss, even where the intended victim is a private person. It has always been sufficient that the accused be aware that there is a risk of economic loss[46]. And even where the victim is a private person, there may be cases of fraud which do not involve an intention to put another person's economic interests at risk in any ordinary sense of that term. To take an example given by King CJ in *R v Kastratovic*[47], someone who believes that a person is indebted to him and that a defence which that person is genuinely asserting is without merit, nevertheless has an intention to defraud if he intends by dishonest means to deprive that other person of the opportunity of having the matter adjudicated.

26 Another matter which should be noted is that it is misleading to speak in terms of the purpose of a conspiracy to defraud, particularly as the purpose of the conspirators may be quite different from the fraud perpetrated. The purpose of conspirators is usually to obtain some financial advantage; the fraud, on the other

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44 [1992] 1 AC 269.

45 [1995] 1 WLR 52.

46 See *Archbold Criminal Pleading, Evidence and Practice*, (1996), vol 2 at 17-92. See also *Welham v Director of Public Prosecutions* (1960) 44 Cr App R 124 at 131; *R v Théroux* (1993) 79 CCC (3d) 449 at 459-461 per McLachlin J; *Zlatic v The Queen* (1993) 79 CCC (3d) 466 at 476 per McLachlin J.

47 (1985) 42 SASR 59 at 65.

hand, is in depriving others of their property or of the opportunity to protect their interests. And, as is pointed out in *Archbold*, the conspirators may never intend or, even, foresee the probability that others will suffer economic loss[48]. Rather, they may genuinely believe that there will be no loss because their venture will be brought to a successful financial conclusion to the advantage of all concerned, even those whose interests have been put at risk.

27 It is convenient now to return to the statement of the Model Criminal Code Officers that it is too broad to define conspiracy to defraud by reference to an intention to inflict economic loss or to imperil the economic interests of others. As already indicated, one difficulty with that statement is that it pays insufficient regard to the need for there to be an agreement to use dishonest means. We have earlier dealt with dishonesty in a general way. It is now necessary to indicate what is involved in dishonest means for the purposes of conspiracy to defraud.

28 As in other contexts, the question whether the agreed means are dishonest is, at least in the first instance, a question of knowledge, belief or intent and, clearly, that is a question of fact for the jury. On the other hand, the question whether, given some particular knowledge, belief or intent, those means are dishonest is simply a question of characterisation. And as in other contexts, the question whether an act done with some particular knowledge, belief or intent is properly characterised as dishonest is usually not in issue. Thus, putting to one side the exceptional case where it is in issue, it is sufficient for a trial judge simply to instruct the jury that they must be satisfied beyond reasonable doubt as to the knowledge, belief or intent alleged by the prosecution before they can convict. Alternatively, the trial judge may instruct the jury that, if satisfied as to the knowledge, belief or intent alleged, the means in question are properly characterised as dishonest and they should so find.

29 Because of the view expressed by McHugh J and Gummow J in this case, we should indicate that we incline to the view that should an issue arise whether the agreed means are properly characterised as dishonest, that issue should be left to the jury. At least, that is so if the means are capable of being so characterised. And the jury should be instructed that the question whether they are to be characterised as dishonest is to be determined by application of the standards of ordinary, decent people. However, these issues need not be pursued in this case.

30 The second difficulty with the statement of the Model Criminal Code Officers that it is too broad to define conspiracy to defraud by reference to an intention to inflict economic loss or to imperil the economic interests of others is that it tends to assume that fraud does not involve an element of dishonesty over and above the use of dishonest means. As has already been pointed out, there are

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48 *Archbold Criminal Pleading, Evidence and Practice*, (1996), vol 2 at 17-92.

difficulties in attempting an exhaustive statement of what is involved in the notion of defrauding or in the offence of conspiracy to defraud. Ordinarily, however, fraud involves the intentional creation of a situation in which one person deprives another of money or property or puts the money or property of that other person at risk or prejudicially affects that person in relation to "some lawful right, interest, opportunity or advantage"[49], knowing that he or she has no right to deprive that person of that money or property or to prejudice his or her interests[50]. Thus, to take a simple example, a "sting" involving an agreement by two or more persons to use dishonest means to obtain property which they believe they are legally entitled to take is not a conspiracy to defraud.

31 It is necessary to note one practical matter with respect to the knowledge that must be proved before there can be a conviction for conspiracy to defraud. As a matter of ordinary experience, it will generally be inferred from an agreement to use dishonest means to deprive another of his or her property or to imperil his or her rights or interests that the parties to that agreement knew they had no right to that property or to prejudice those rights or interests. And as with the defence of honest claim of legal right, it will be taken that there is no issue in that regard unless the absence of knowledge or, which is the same thing, belief as to legal right is specifically raised and there is some evidence to that effect[51].

32 It is necessary to make some reference to *Wai Yu-Tsang v The Queen*[52] and *Adams v The Queen*[53], decisions referred to by the Model Criminal Code Officers. In *Wai Yu-Tsang*, it was said by the Privy Council that "if [the parties to the alleged conspiracy] were not acting dishonestly, there will have been no conspiracy to defraud"[54]. There is nothing in that statement to suggest that it is prescriptive of the elements of the offence, rather than descriptive of it. In *Adams v The Queen*[55], the Privy Council proceeded on the basis that it was necessary to establish dishonesty, holding that it was dishonest to conceal that which there was a duty to

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49 *R v Kastratovic* (1985) 42 SASR 59 at 62 per King CJ.

50 See *Archbold Criminal Pleading, Evidence and Practice*, (1996), vol 2 at 17-89, 17-94. See also *R v Sinclair* (1968) 52 Cr App R 618.

51 See, with respect to honest claim of legal right, *R v Bernhard* [1938] 2 KB 264.

52 [1992] 1 AC 269.

53 [1995] 1 WLR 52.

54 [1992] 1 AC 269 at 280.

55 [1995] 1 WLR 52.

disclose[56]. In that case, the Privy Council was concerned with the need for conspirators to agree to use dishonest means, not to identify "dishonesty" as a separate element of the offence in addition to the dishonesty involved in an agreement to use dishonest means to bring about a situation prejudicing or imperilling the rights or interests of others.

33 As already explained, "dishonesty" does not appear in the statute establishing the offence of conspiracy to defraud the Commonwealth. But when properly analysed, the offence of conspiracy to defraud involves dishonesty at two levels. First, it involves an agreement to use dishonest means. Ordinarily, the means will be dishonest if they assert as true something which is false and which is known to be false or not believed to be true or if they are means which the conspirators know they have no right to use or do not believe that they have any right to use the means in question. And quite apart from the use of dishonest means, the offence involves an agreement to bring about a situation prejudicing or imperilling existing legal rights or interests of others. That, too, is dishonest by ordinary standards. If those matters are properly explained to a jury, further direction that the accused must have acted dishonestly is superfluous. Conversely, if those matters are not properly explained, a direction that the jury must be satisfied that the conspirators were dishonest is unlikely to cure the defect.

34 It need hardly be said again that a statute establishing an offence may use the term "dishonestly" in its ordinary meaning[57] or use it in a special sense[58]. In either case it will ordinarily be necessary for the trial judge to explain precisely what the legislation requires. In the case of conspiracy to defraud, it will ordinarily be sufficient to instruct the jury as to the facts they must find if the agreed means are to be characterised as dishonest. Alternatively, it will be sufficient to instruct them that, if satisfied as to those facts, they will be satisfied that the agreed means were dishonest. Only in the borderline case will it be necessary for the question whether the means are to be so characterised to be left to the jury. In this area, but only in this area, we differ from the approach taken by McHugh J and Gummow J.

No miscarriage of justice

35 In the present case, the jury was instructed that the prosecution had to establish that the appellant was dishonest in the sense that he knew the mortgage transactions were sham and also in the sense that he agreed to participate in those sham transactions to bring about a situation in which the Commissioner would or

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56 [1995] 1 WLR 52 at 65.

57 As in *Ghosh.*

58 As in *Salvo*.

might not receive income tax payable on the moneys used by Spong to purchase the Essendon properties. In the circumstances, that direction was adequate even though there was no instruction that they should be satisfied that the appellant knew that he had no right to prejudice or imperil the Commissioner's right to receive that tax.

36 There may be cases where the evidence is such that, even though the issue is not specifically raised, it is necessary to instruct the jury that they must be satisfied that the accused neither had nor believed that he had a legal right to prejudice or imperil the rights or interests of the victim of the intended fraud. But that is not the case where, as here, the appellant asserted no such right or belief and the assertion of a right or belief that he had a right to prejudice the Commissioner in relation to tax payable by Spong would have been patently absurd.

37 In the circumstances, the instruction to the jury that they had to be satisfied that the appellant's conduct was dishonest according to the standards of ordinary, honest people and that he knew it was dishonest by those standards afforded the appellant a forensic advantage to which he was not entitled. There was, thus, no miscarriage of justice by reason of that direction.

38 The appeal must be dismissed.

39 McHUGH J. The questions in this appeal are whether dishonesty is an essential element of the crime of conspiracy to defraud and, if it is, whether the test of dishonesty is that described in *R v Ghosh*[59]. The appeal is brought against an order of the Court of Appeal of the Supreme Court of Victoria dismissing the appellant's appeal against a conviction for conspiracy to defraud the Commonwealth. In my opinion, the Crown does not have to prove dishonesty as an element of conspiracy to defraud at common law or under s 86A of the *Crimes Act* 1914 (Cth)[60]. The appeal should be dismissed.

The factual background

40 In 1983, Larry James Spong and Franco Butera, a solicitor, were involved in unlawful drug trafficking and made significant profits. They agreed to conceal the profits from the Commissioner of Taxation. Under this agreement, Spong purchased five blocks of land in Essendon in false names. Butera acted for Spong in respect of the conveyancing of the five blocks. One of the blocks, containing a substantial residence, was purchased for $300,000 and was known as "Marlodge". When Spong and Butera learned that they were under police surveillance, they arranged for all the conveyancing files to be transferred to the appellant, Philip Peters, who was also a solicitor.

41 In October 1983, the appellant acquired a shelf company, Jetoline Pty Ltd ("Jetoline"), for Spong. The appellant was a shareholder and director of Jetoline. Jetoline was registered as the purchaser of Marlodge. To enable Jetoline to purchase the property, a "mortgage" over the land in the sum of $180,000 was executed in favour of one Rosenberg which, to the appellant's knowledge, was an alias of Spong. In December 1983, a mortgage for $500,000 over all five blocks of land was executed in favour of Dial Financial Services Pty Ltd ("Dial").

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59 [1982] QB 1053 at 1064:

> "In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.
>
> If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest."

60 Section 8 of the *Crimes Amendment Act* 1995 (Cth) repealed ss 86 and 86A and substituted a new s 86.

The appellant knew that that mortgage was a sham, with no money being advanced under it.

42 Subsequently, the four blocks other than Marlodge were sold and successive withdrawals of caveat were prepared to enable Spong, in his relevant false identity, to give title to the purchasers. Monies in partial discharge of the $500,000 mortgage were paid to Dial and then on to Spong. The appellant acted as the solicitor in each of the sales and knew that the monies which Spong had provided would be repaid to Spong.

43 Much of the Crown case relied on the evidence of Butera and another conspirator named Coppens, an accountant, who had been involved in the sham transaction with Dial. Their evidence was critical because much of the documentary evidence was consistent with the appellant's claim that he was acting merely as a solicitor and had no knowledge that the money used by Spong was the product of drug trafficking[61].

44 Butera claimed that, at a meeting on 23 December 1983 at the office of another solicitor, Campbell, the appellant and Coppens produced two mortgages, the appellant's mortgage being for $180,000 and Coppens' mortgage for $500,000. Butera said that, while the parties were discussing the mortgages, which were executed in his presence, reference was made to the need to conceal the source of the purchase funds and concern was expressed as to whether the mortgage for $500,000 could be explained if later scrutinised. Coppens did not recall the appellant being present at that meeting and the appellant denied that he was present.

45 However, Coppens gave evidence that, at a meeting in the appellant's office before December 1983, the appellant devised a scheme to enable Spong to hide the source of the monies from the Commissioner of Taxation. Central to the scheme was the rotation of money through Dial. Coppens said that, from time to time thereafter, he had further discussions with the appellant regarding the scheme, which was completed by the execution of the mortgages in Campbell's office on 23 December 1983.

The history of the proceedings

46 The appellant was charged with conspiring with Spong, Butera, Coppens and another person "to defraud the Commonwealth, namely the Commissioner of

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61 However, the conveyancing files contained original letters which had not been sent to the designated "purchasers" of the blocks of land, thus supporting an inference that the appellant knew the purchasers were Spong in his various identities.

Taxation, contrary to paragraph 86(1)(e) of the Crimes Act 1914 until 24 October 1984, and thereafter contrary to section 86A of the said Act"[62].

47 The appellant was also charged with conspiring with Spong, Butera, Coppens and another person "to pervert the course of public justice, in that it was agreed to conceal the proceeds of LARRY JAMES SPONG's drug trafficking and thereby mislead and deflect police from investigating and prosecuting LARRY JAMES SPONG for such drug trafficking." The jury subsequently acquitted the appellant of this charge.

48 Judge Hassett presided at the appellant's trial by jury in the County Court at Melbourne. In the course of his summing up, his Honour directed the jury on the charge of conspiracy to defraud as follows:

> "So what in summary are the elements of the charge in the first count? There are five elements really in the context of this case. First, an agreement to defraud which had as its outcome or incidental to its outcome, a depriving of the Commissioner of Taxation of income tax payable on monies of Mr Spong or the risk of that deprivation.
>
> Secondly, that the accused man was party to that agreement. Thirdly, that the accused man intended to defraud the Commissioner of Taxation. That is that he knew that the course of conduct agreed to be embarked upon involved the deprivation of the Commissioner of Taxation of that income tax or the risk of that deprivation. Four, that what was intended to be done was dishonest according to the standard of ordinary reasonable and honest people

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62 The *Statute Law (Miscellaneous Provisions) Act (No 2)* 1984 (Cth) repealed s 86(1)(e) and inserted s 86A. Section 86(1)(e) relevantly provided:

> "A person who conspires with another person -
>
> ...
>
> (e) to defraud the Commonwealth or a public authority under the Commonwealth,
>
> shall be guilty of an indictable offence."

Section 86A relevantly provided:

> "A person who conspires with another person to defraud the Commonwealth or a public authority under the Commonwealth is guilty of an indictable offence."

in the community and fifthly, the accused knew that what was intended was dishonest by those standards."

49 This was essentially the manner in which the learned trial judge put the prosecution case to the jury, although his Honour expanded on these directions at other stages of the summing up. The fourth and fifth elements of his Honour's direction follow the test of dishonesty set out in *Ghosh*.

50 The jury convicted the appellant on the charge of conspiracy to defraud. Judge Hassett sentenced the appellant to imprisonment for 18 months. The appellant appealed to the Court of Appeal of the Supreme Court of Victoria (Tadgell, Ormiston JJA and Southwell AJA). The Court of Appeal dismissed the appeal, holding that the trial judge had correctly directed the jury on the test of dishonesty[63].

The evolution of the crime of conspiracy

51 Having regard to the state of the authorities dealing with the issues raised in this case, it is necessary to trace the development of the law of conspiracy in some detail. A conspiracy to defraud is one of the heads of the crime of conspiracy, a crime which was described by Willes J in *Mulcahy v The Queen*[64], as being an "agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means."[65] The second limb of this celebrated description, however, adds nothing: agreeing to use unlawful means necessarily involves agreeing to do an unlawful act.

52 The crime of conspiracy is commonly accepted as deriving from three statutes enacted in the reign of Edward I[66] although only the third statute made any attempt to define what constituted a conspiracy. That statute, the *Ordinacio de*

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63 *R v Peters* [1997] 1 VR 489.

64 (1868) LR 3 HL 306 at 317. Willes J delivered the opinion of the Judges (Willes, Blackburn and Keating JJ and Bramwell B and Pigott B). The opinion was given in response to questions put to them by Cairns LC after the plaintiff brought a writ of Error in the House of Lords seeking to reverse a decision of the Court of Queen's Bench of Ireland. The House of Lords approved the opinion delivered by Willes J.

65 The source of this description is the judgment of Denman CJ in *R v Jones* (1832) 4 B & Ad 345 at 349 [110 ER 485 at 487].

66 *De Conspiratoribus Ordinatio*, 1293 (21 Edw I, I Rot Parl at 96); *Articuli Super Cartas*, 1300 (28 Edw I, c 10); *Ordinancio de Conspiratoribus*, 1305 (33 Edw I).

Conspiratoribus 1305[67], defined a conspiracy, inter alia, as an agreement, to combine falsely and maliciously to indict or acquit people. It is likely, however, that the notion of conspiracy as a breach of the law was known to the common law. The omission from the first two Edwardian statutes of any definition of a conspiracy suggests that the common lawyers of the day already had some understanding of the term. Indeed, some early writings "evidence a conception of conspiracy which had attained to some growth in the virgin soil of the common law quite independently of the Edwardian statutes."[68] In any event, by the early 17th century the common law had developed to the extent that, independently of the statutes, it was an offence to conspire to abuse legal procedure. In the *Poulterers' Case*[69], the Court of Star Chamber held, contrary to the early law, that mere agreement could constitute the offence.

53 Upon the abolition of the Star Chamber, the Court of Kings Bench "began to extend the offense so as to cover combinations to commit all crimes of whatsoever nature, misdemeanours as well as felonies."[70] The offence quickly developed beyond that of interfering with the administration of justice. In the course of time, the common law developed various heads of criminal conspiracy such as conspiracy to pervert the course of justice, conspiracy to cheat and defraud, conspiracy to injure individuals other than by fraud, and conspiracy to commit a crime[71]. Until the House of Lords' decision in *Director of Public Prosecutions v Withers*[72], many lawyers assumed that the law of conspiracy was still capable of vigorous expansion to match changing circumstances. Criminal conspiracy as defined by Willes J in *Mulcahy* had an inherent potential for dynamic development[73], a potential accentuated by the common law's acceptance at an early stage that the requirement of an unlawful act did not require a criminal act[74]. The

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67 33 Edw I, Stat 2.

68 Bryan, *The Development of the English Law of Conspiracy*, (1909) at 11.

69 9 Co Rep 55b [77 ER 813].

70 Sayre, "Criminal Conspiracy", 35 *Harvard Law Review* 393 at 400 (1922).

71 Wright, *The Law of Criminal Conspiracies and Agreements*, (1873) at 19-67.

72 [1975] AC 842.

73 cf *Director of Public Prosecutions v Withers* [1975] AC 842 at 867-868 per Lord Simon of Glaisdale.

74 *R v Sterling* (1665) 1 Lev 125 [83 ER 331]; *Thody's Case* (1674) 1 Ventris 234 [86 ER 157]; *R v Orbell* (1703) 6 Mod 42 [87 ER 804]; *R v Journeymen-Taylors of Cambridge* (1721) 8 Mod Rep 10 [88 ER 9].

description of conspiracy approved by the House of Lords in *Mulcahy* was therefore flexible enough to allow the courts to expand the crime in accordance with general notions of public policy. The decision of the House of Lords in *Shaw v Director of Public Prosecutions*[75], dealing with conspiracy to corrupt public morals, is a well known illustration of the assumption that in this area of law the courts had the power to declare conduct criminal which had not previously been regarded as criminal. In *Withers*, however, the House of Lords made it clear that, although there is only one offence of conspiracy which for convenience is categorised into separate heads[76], the courts cannot develop the law of conspiracy by adding new heads to those already recognised by the law. It is for Parliament to expand the offence by statute, if it so desires.

54 It does not follow, however, that because the courts can no longer develop new heads of conspiracy, they are also restrained from formulating or developing principles that apply to the recognised heads of conspiracy. On the contrary, because there is only one offence of conspiracy, it seems imperative that, so far as possible, the *actus reus* and *mens rea* of each of the recognised heads should be governed by the same principles. A real question arises, however, whether dividing the elements of conspiracy into an *actus reus* and a *mens rea* serves any useful purpose[77]. In his treatise on the law of criminal conspiracy, Goode contends that[78] "the concept of *actus reus* is an elusive one, particularly in the area of criminal conspiracy; so much so, in fact, that it may well be possible to say that the crime has no distinguishing mental and physical elements." In *R v Churchill and Walton*[79] the accused was charged with conspiracy to commit an offence against a statute, the offence being one of strict liability. Viscount Dilhorne said[80] that "mens rea is only an essential ingredient in conspiracy in so far as there must be an intention to be a party to an agreement to do an unlawful act" and that in "cases of this kind, it is desirable to avoid the use of the phrase 'mens rea' ... and to concentrate on the terms or effect of the agreement".

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75 [1962] AC 220. See also *Kamara v Director of Public Prosecutions* [1974] AC 104.

76 [1975] AC 842 at 856.

77 cf Harno, "Intent in Criminal Conspiracy", 89 *University of Pennsylvania Law Review* 624 at 632 (1941): "It is difficult to make an analysis of the elements of conspiracy because the crime is so predominantly mental in composition."

78 *Criminal Conspiracy in Canada*, (1975) at 16.

79 [1967] 2 AC 224.

80 [1967] 2 AC 224 at 237.

55 One of the difficulties in dividing the offence of conspiracy into the traditional elements of an *actus reus* and a *mens rea* is that the agreement of the parties to pursue a common and unlawful design is traditionally regarded as the *actus reus* of the offence. Yet such an agreement, assuming it to be voluntary, necessarily includes a mental element[81]. At the very least, there must be an intention to enter into the agreement[82], and the present state of the authorities suggests that there can be no conspiratorial agreement unless the accused and his or her co-conspirators also intend that the common design should be carried out.

56 Because intention is involved in the *actus reus* of the offence, authority in Canada[83], England[84] and the United States[85] holds that two persons cannot be guilty of conspiracy unless both intend to make an agreement to do an unlawful act and both intend to carry it out. Thus, in *R v O'Brien*[86] the Supreme Court of Canada held that it was open to a jury to find that there was no conspiracy where two persons had agreed to kidnap another person but one of them, Tulley, swore that he never had any intention of carrying it out. A majority of the Court held that the trial judge had misdirected the jury by instructing them "that the offence was complete, if, in point of fact, the accused and Tulley did make the agreement which is charged against him, even though Tulley never at any time had any intention of carrying the agreement into effect" (emphasis omitted). Rand J said[87]:

> "[A] conspiracy requires an actual intention in both parties at the moment of exchanging the words of agreement to participate in the act proposed; mere words purporting agreement without an assenting mind to the act proposed are not sufficient."

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81 Note, "Developments in the Law: Criminal Conspiracy", 72 *Harvard Law Review* 920 at 935 (1959).

82 Harno, "Intent in Criminal Conspiracy", 89 *University of Pennsylvania Law Review* 624 at 631 (1941).

83 *R v O'Brien* [1954] SCR 666.

84 *R v Thomson* (1965) 50 Cr App R 1.

85 *Woodworth v The State* 20 Tex App 375 (1881); *Delaney v State* 51 SW 2d 485 (1932).

86 [1954] SCR 666.

87 [1954] SCR 666 at 670.

This statement accords with the summing up of Erle J in *R v Dowling*[88] where his Lordship instructed the jury that a witness "was not an accomplice, for he did not enter the conspiracy with the mind of a co-conspirator, but with the intention of betraying it to the police, with whom he was in communication."

57 In *O'Brien*, Taschereau J said[89]:

> "I think there has been some confusion as to the element of intention which is necessary to constitute the offence. It is, of course, essential that the conspirators have the *intention to agree*, and this agreement must be complete. There must also be a common design to do something unlawful, or something lawful by illegal means. Although it is not necessary that there should be an overt act in furtherance of the conspiracy, to complete the crime, I have no doubt that there must exist *an intention to put the common design into effect*. A common design necessarily involves an intention. Both are synonymous. The intention cannot be anything else but the will to attain the object of the agreement." (emphasis in original)

58 In *O'Brien*, the majority of the Supreme Court regarded the lack of any common intention to carry out the kidnapping as preventing the criminal agreement from arising, notwithstanding that both Tulley and the accused had agreed to kidnap the victim. The accused clearly intended to make an agreement to kidnap and also intended to carry it out. The elements of the offence were made out in so far as they concerned the *accused's* conduct and state of mind. However, the Supreme Court concluded that it was open to the jury to acquit the accused if Tulley never intended to carry out the kidnapping. Arguably, this conclusion means that Tulley's lack of intention went not merely to his *mens rea* but also to the making of the criminal agreement (ie, the *actus reus* of the offence with which both Tulley and the accused were charged). However, the conclusion is also explicable on the related ground that there must be at least two conspirators and, if Tulley was not guilty of conspiracy, neither was the accused.

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88 (1848) 3 Cox CC 509 at 516.

89 [1954] SCR 666 at 668.

59 In *R v Thomson*[90], there was evidence on which the jury could conclude that the accused had led his alleged co-conspirators to believe that he was agreeing with them to carry out an unlawful purpose when he had no intention of assisting in carrying out that purpose. Lawton J seems to have taken the view that the mental reservation of the accused prevented any criminal agreement on his part from coming into existence. His Lordship, after expressing his agreement with the view of the majority of the Supreme Court of Canada went on to say[91]:

> "For the purposes of the law of contract, the words or conduct by which a man manifests his assent are binding on him and the law does not allow him to say that his mind did not go with his conduct. The criminal law, however, is concerned with punishing wrongdoing; the essential element in any crime, other than in the limited class of absolute offences, is a guilty mind. Evidence that the accused person acted and spoke as if he was making and had made an agreement may provide cogent evidence of a guilty mind; but it is only evidence and can be rebutted by other evidence.
>
> It follows, in my judgment, that in the crime of conspiracy there must be the element of a guilty mind."

His Lordship's agreement with the majority of the Supreme Court in *O'Brien* and his reference to the law of contract suggest that he saw the lack of intention to carry out the agreement as preventing any criminal agreement arising, notwithstanding his reference to "a guilty mind".

60 In *R v Gemmell*[92], the Court of Appeal of New Zealand held that a trial judge had wrongly directed the jury that the accused was guilty of conspiracy to commit an armed robbery if he agreed to the robbery of a post office even if he did not know that the other conspirators intended to use a gun. McMullin J, delivering the judgment of the Court, said[93]:

> "It is of the essence of a conspiratorial agreement that there must be not only an intention to agree but also a common design to commit some offence, that is, to put the design into effect. The need for the existence of these two elements, the mens rea and actus reus, as they are sometimes called, may be more difficult to distinguish in conspiracy than in other crimes."

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90 (1965) 50 Cr App R 1.

91 (1965) 50 Cr App R 1 at 3-4.

92 (1985) 1 CRNZ 496.

93 (1985) 1 CRNZ 496 at 500.

After referring to the judgment of Taschereau J in *O'Brien* and noting the decision in *Thomson*, McMullin J said[94]:

> "To return to the traditional nomenclature of the criminal law, the mens rea is the intention of the conspirator to achieve the common design and his mind must go with the apparent manifestation of his consent. The actus reus of the offence of conspiracy is the agreement which has a common design. The actus reus does not exist in mere formulation of an intention in the minds of two or more persons to commit a crime; there must be an agreement into which that intention is translated."

61 The reference to *mens rea* in this passage shows how difficult it is to separate the elements of *actus reus* and *mens rea* in conspiracy. Although the language used is unclear, his Honour appears to be saying that no criminal agreement or *actus reus* can exist unless, separately considered, both parties intend to do an unlawful act in prosecution of a common design and both parties make an agreement together to carry out that common design.

62 In principle, it seems correct to conclude that there is no criminal conspiracy between two people unless, at the time of making the alleged agreement, both parties intend to carry it out. This is because "the long established rule that conspiracy requires at least two guilty parties means that as against any particular accused the actus reus will include the existence of the requisite 'intent' on the part of at least one other person who has manifested agreement"[95]. If one person has not in fact conspired to do an unlawful act, it is impossible to hold that the only other party to the alleged conspiracy has nevertheless conspired to do that act. As Deane J pointed out in *Gerakiteys v The Queen*[96]: "[t]here must be at least two parties to a conspiracy." The required intention cannot differ as between the alleged conspirators - if an intention to do an unlawful act is not required of one party, the law cannot require it of the other party. And as Professor Sir John Smith points out[97] a "conspiracy which no one intends to carry out is an absurdity, if not an impossibility." In an illuminating article[98], Dean Harno persuasively argued

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94 (1985) 1 CRNZ 496 at 500.

95 Orchard, "The Mental Element Of Conspiracy", (1985) 2 *Canterbury Law Review* 353 at 357.

96 (1984) 153 CLR 317 at 334.

97 Smith and Hogan, *Criminal Law*, 8th ed (1996) at 282.

98 "Intent in Criminal Conspiracy", 89 *University of Pennsylvania Law Review* 624 at 629-630 (1941).

that Willes J's statement in *Mulcahy*[99] that a "conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act", should perhaps have emphasised that "conspiracy consists not merely in the agreement of two or more but in their intention."

63 Nothing in *R v Darby*[100] is inconsistent with the proposition that a person cannot be guilty of criminal conspiracy if the only other party to the alleged conspiracy never intended to carry out the agreement. In *Darby*, this Court held that one person could be convicted of criminal conspiracy even though the other alleged party to the conspiracy had been or was acquitted of the charge "unless in all the circumstances of the case his conviction is inconsistent with the acquittal of the other person."[101] This conclusion is plainly correct because, among other reasons, evidence which is admissible against one accused - for example, a confession - may not be admissible against the other accused. Where, however, one of the two parties never intended to carry out the alleged agreement to do an unlawful act, the conviction of the other is necessarily inconsistent with the conclusion that the other party is not a conspirator.

64 The decisions in *O'Brien* and *Thomson* are consistent with the view that the reason why the law punishes conspiracies is not so much because parties have made an agreement or have evil minds but because they both intend to achieve some further act that is detrimental to the welfare of society. It is the likelihood that their common intention will be translated into socially undesirable action that prompts the State to intervene. If one of the two parties has no intention of committing the socially harmful act, it lessens the chance that the act will occur. It merely lessens the chance, however, rather than eliminates it altogether. In many cases the encouragement flowing from the agreement may cause the other party to carry out that act. In my view, Dean Harno was right when he said[102]:

> "Conspiracy is an inchoate crime for which the essential act is slight. It involves an intent to commit a further act. It is the commission of that act which the state desires to prevent, and it is with the intent to commit that act that the state is concerned. The essence of the crime thus lies in the intent."

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99 (1868) LR 3 HL 306 at 317.

100 (1982) 148 CLR 668.

101 (1982) 148 CLR 668 at 678.

102 "Intent in Criminal Conspiracy", 89 *University of Pennsylvania Law Review* 624 at 646 (1941).

65 The decision of this Court in *Gerakiteys*[103] also emphasises that the conspirators must have a common intention to achieve the same unlawful object. The Court held that the accused could not be guilty of conspiring with nine other persons to defraud a number of insurance companies because the evidence did not establish that the accused and the other persons all had a common purpose of defrauding those companies. Rather, the evidence established no more than that the accused and one other person had a common purpose of defrauding a particular company.

66 It would seem to follow from *Gerakiteys* that a person must intend to achieve the carrying out of the unlawful act and that it is not sufficient proof of a criminal conspiracy that he or she realised that the probable consequences of his or her conduct might result in the performance of the unlawful act. Indeed, the editor of *Howard's Criminal Law*[104] declares that the effect of *Gerakiteys* is that "reckless assistance or encouragement does not amount to a conspiratorial agreement." Similarly, Dean Harno contended that[105] "[c]riminal conspiracy involves a specific intent to commit a particular act"; and Professor Sir John Smith says[106] that "[r]ecklessness as to circumstances of the *actus reus* is not a sufficient *mens rea* on a charge of conspiracy to commit a crime even where it is a sufficient *mens rea* for the crime itself". More importantly, Wilson, Deane and Dawson JJ took the same view in an *obiter* comment in *Giorgianni v The Queen*[107]. Their Honours said[108]:

> "For the purposes of many offences it may be true to say that if an act is done with foresight of its probable consequences, there is sufficient intent in law even if such intent may more properly be described as a form of recklessness. There are, however, offences in which it is not possible to speak of recklessness as constituting a sufficient intent. Attempt is one and *conspiracy* is another." (emphasis added)

67 One difficult area of intention in cases of conspiracy to injure or defraud arises where relevant harm is suffered only by a person whose person or interests

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103 (1984) 153 CLR 317.

104 5th ed (1990) at 370-371.

105 "Intent in Criminal Conspiracy", 89 *University of Pennsylvania Law Review* 624 at 635 (1941).

106 Smith and Hogan, *Criminal Law*, 8th ed (1996) at 287.

107 (1985) 156 CLR 473.

108 (1985) 156 CLR 473 at 506.

were not the object of the agreement. In principle, it is clear that the court cannot attribute a constructive intention to the defendants. Consequently, in *Attorney-General's Reference (No 1 of 1982)*[109] the English Court of Appeal held that the defendants could not be indicted in England where they had agreed to defraud persons in Lebanon by selling bottles of whisky on which they had fraudulently placed the labels of an English company (the "X company"). For jurisdictional reasons[110], they could not be indicted for conspiracy to defraud the purchasers, and, since harm to the X company was not the object of their agreement, the Court of Appeal held that had not conspired to defraud that company. Delivering the judgment of the Court, Lord Lane CJ said[111]:

> "It may well be that if the plan had been carried out, some damage could have resulted to the X company. But that would have been a side effect or incidental consequence of the conspiracy, and not its object. There may be many conspiracies aimed at particular victims which in their execution result in loss or damage to third parties. It would be contrary to principle, as well as being impracticable for the courts to attribute to defendants constructive intentions to defraud third parties based on what the defendants should have foreseen as probable or possible consequences. In each case to determine the object of the conspiracy, the court must see what the defendants actually agreed to do."

68 But this statement, although correct so far as it goes, overlooks the fact that a jury could find that the X company must inevitably have suffered loss or been prejudiced[112] by the conspiracy and that the defendants knew it. It is no misuse of language in that context to say that the defendants intended to cause damage to the X company. At all events, a jury could find from those facts that the defendants intended to cause harm to the X company. No doubt when a person intends to do something, ordinarily he or she acts in order to bring about the occurrence of that thing. But a person may intend to do something even though it is the last thing

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109 [1983] QB 751.

110 By the English common law, a conspiracy to commit a crime abroad is not indictable in England unless the crime is one for which an indictment would lie in England: *Board of Trade v Owen* [1957] AC 602.

111 [1983] QB 751 at 757.

112 The potential loss of sales or injury to reputation as the result of the defendants passing off a different and presumably cheaper product.

that he or she wishes to bring about[113]. Intention in this context is broader than a person's inclination to act to achieve a result that he or she believes is desirable. If a person does something that is virtually certain to result in another event occurring and knows that that event is certain or virtually certain to occur, for legal purposes at least he or she intends it to occur[114]. In *R v Moloney*[115] and *R v Hancock and Shankland*[116], however, the House of Lords held that foresight of a consequence, even foresight that the consequence was virtually certain, was merely evidence of intention. But if this is so, a jury would be bound to acquit a person accused of murder if the jurors believed that the accused had not committed the fatal act in order to bring about the death of the deceased even though the accused knew that death was the certain result of his or her actions.

69 For present purposes, it is sufficient to say that, although it is wrong to impute a constructive intention to defendants charged with conspiracy, they may have intended to injure or defraud a person even though that person or his or her interests were not the object of the conspiracy. This seems to have been accepted by the House of Lords in *R v Cooke*[117] where, surprisingly, no reference was made to *Attorney-General's Reference (No 1 of 1982)*[118]. In *Cooke*, the House held that employees of the British Rail Board could properly be convicted at common law of conspiring to defraud the Board "by making sales of food and drink not the property of the ... Board to customers of the ... Board and by failing to account to the ... Board for the proceeds of sale thereof."[119] The accused, who were crew

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113 In *R v Moloney* [1985] AC 905 at 926, Lord Bridge of Harwich gave an example of the distinction:

> "A man who, at London Airport, boards a plane which he knows to be bound for Manchester, clearly intends to travel to Manchester, even though Manchester is the last place he wants to be and his motive for boarding the plane is simply to escape pursuit."

114 *Giorgianni v The Queen* (1985) 156 CLR 473 at 506 and cf *The Macquarie Dictionary*, 2nd ed (1991) at 915: "intent ... 3. *Law.* the state of a person's mind which directs his actions towards a specific object."

115 [1985] AC 905.

116 [1986] AC 455.

117 [1986] AC 909.

118 [1983] QB 751 at 757.

119 [1986] AC 909 at 921 per Lord Mackay of Clashfern quoting from the particulars of the offence charged.

members of a train with a refreshment service, had brought their own tea and coffee powder and cheese and beefburgers onto the train and sold them to passengers.

Conspiracy to defraud

70 Conspiracy to defraud is a particular application of the statement of Willes J in *Mulcahy*[120] that a conspiracy consists of "the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means." The criminal law of conspiracy began to expand "during the reign of Edward III ... accelerated in the time of Elizabeth and James I, and had made its most important progress by the end of the reign of George III."[121] Indeed, it was not until around the time of George III (1760-1820) that conspiracy to defraud became recognised as an independent head of criminal conspiracy. Cheating the public had long been recognised as an indictable offence but, until *R v Wheatley*[122], the fact that more than one person was involved in the cheating seems to have been merely a matter of aggravation[123], not liability. In *Wheatley,* Mansfield LCJ said[124] that "[a]ll indictable cheats are where the public in general may be injured; as by using false weights, measures, or tokens; - or where there is a conspiracy." The view that a conspiracy to cheat was indictable was accepted by Kenyon LCJ in *R v Lara*[125]. The final step in the development of this branch of the law was taken in *R v Gill and Henry*[126] where the Court of Kings Bench upheld an indictment for conspiracy to cheat and defraud although the means of the cheating were not specified. Abbott CJ said[127]:

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120 (1868) LR 3 HL 306 at 317.

121 Bryan, *The Development of the English Law of Conspiracy*, (1909) at 53.

122 (1760) 1 W Bl 273 [96 ER 151].

123 Thus, in *Thody's Case* (1674) 1 Vent 234 [86 ER 157] where the charge was a conspiracy to cheat by using false dice, Wylde J said that "the conspiracy is laid only by way of aggravation." In *R v Parry, Snelling et al* (1704) 2 L Ray 865 [92 ER 78] although several persons were charged with "having cheated JS" the indictment was upheld "because it is a cheat". The element of combination seems to have played no part in maintaining the indictment.

124 (1760) 1 W Bl 273 at 275 [96 ER 151 at 152].

125 (1795) 6 TR 565 [101 ER 706].

126 (1818) 2 B & Ad 204 [106 ER 341].

127 (1818) 2 B & Ad 204 at 205 [106 ER 341 at 342].

> "It is objected that the particular means and devices are not stated. It is, however, possible to conceive that persons might meet together, and might determine and resolve that they would, by some trick and device, cheat and defraud another, without having at that time fixed and settled what the particular means and devices should be. Such a meeting and resolution would nevertheless constitute an offence."

Henceforth, a mere agreement to cheat and defraud without any overt acts implementing the conspiracy was sufficient.

71 Throughout the 18th and 19th centuries, most reported cases upholding an indictment for a conspiracy to cheat and defraud involved deception by means of false pretences[128]. Nevertheless, the cases showed that any combination to cause financial prejudice by dishonesty would suffice to found an indictment or information. Thus, in *R v Hilbers*[129] the Court of Kings Bench refused to set aside a criminal information charging the defendants with conspiracy to raise the price of oil by making fictitious sales. In *R v Hall*[130], the Court held that an indictment would lie for the defrauding of creditors by disposing of goods after an act of bankruptcy. And in *R v Absolon and Clark*[131] the Court held that an indictment would lie for conspiracy to cheat and defraud a railway company where the defendants had purchased "not transferable" tickets for the purpose of selling them. Moreover, in *Levi v Levi*[132], a civil action for slander for imputing a felony, Gurney B directed the jury that if, pursuant to an agreement, a group of people go to an auction with the shared intention that only one of them would bid for any

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128 *R v Hevey, Beatty and M'Carty* (1782*)* 1 Leach 232 [168 ER 218]; *R v Brisac and Scott* (1803) 4 East 164 [102 ER 792]; *R v Roberts* (1808) 1 Camp 399 [170 ER 999]; *R v Pywell* (1816) 1 Stark 402 [171 ER 510]; *R v Gill and Henry* (1818) 2 B & Ad 204 [106 ER 341]; *R v Whitehead* (1824) 1 C & P 67 [171 ER 1105]; *R v Cooke* (1826) 5 B & C 538 [108 ER 201]; *R v Serjeant* (1826) 1 R & M 352 [171 ER 1046]; *R v Hamilton* (1836) 7 C & P 448 [173 ER 199]; *R v Steel* (1841) 2 Moo 246 [169 ER 98]; *R v Kenrick* (1843) 5 QB 49 [114 ER 1166]; *R v Gompertz* (1846) 9 QB 824 [115 ER 1491]; *R v Read* (1852) 6 Cox 77(b); *R v Whitehouse* (1852) 6 Cox CC 38; *R v Yates* (1853) 6 Cox CC 441; *R v Carlisle and Brown* (1854) Dears CC 337 [169 ER 750]; *R v Bullock and Clark* (1856) Dears CC 653 [169 ER 883]; *R v Esdaile* (1858) 1 F & F 213 [175 ER 696]; *R v Timothy* (1858) 1 F & F 39 [175 ER 616]; *R v Barry* (1865) 4 F & F 389 [176 ER 615]; *Latham v The Queen* (1864) 9 Cox CC 516.

129 (1818) 2 Chit (KB) 163.

130 (1858) 1 F & F 33 [175 ER 613].

131 (1859) 1 F& F 498 [175 ER 825].

132 (1833) 6 C & P 239 [172 ER 1224].

particular article, and that they would later sell the articles that they had bought and divide the profits, they could be tried for a conspiracy to defraud the owners of the goods.

72 These cases show that deception was not an essential element of a conspiracy to defraud. It was sufficient if the defendants agreed to use dishonest means to achieve their object. However, a conspiracy to defraud involves more than an agreement to use dishonest means to achieve some object. As Lord Radcliffe pointed out in *Welham v Director of Public Prosecutions*[133]:

> "[D]efrauding involves doing something to someone. Although in the nature of things it is almost invariably associated with the obtaining of an advantage for the person who commits the fraud, it is the effect upon the person who is the object of the fraud that ultimately determines its meaning."

His Lordship went on to say[134]:

> "[P]opular speech does not give, and I do not think ever has given, any sure guide as to the limits of what is meant by 'to defraud.' It may mean to cheat someone. It may mean to practise a fraud upon someone. It may mean to deprive someone by deceit of something which is regarded as belonging to him or, though not belonging to him, as due to him or his right. It passes easily into metaphor, as does so much of the English natural speech. Murray's New English Dictionary instances such usages as defrauding a man of his due praise or his hopes. Rudyard Kipling in the First World War wrote of our 'angry and defrauded young.' There is nothing in any of this that suggests that to defraud is in ordinary speech confined to the idea of depriving a man by deceit of some economic advantage or inflicting upon him some economic loss.
>
> Has the law ever so confined it? In my opinion there is no warrant for saying that it has. What it has looked for in considering the effect of cheating upon another person and so in defining the criminal intent is the prejudice of that person: what Blackstone[135] called 'to the prejudice of another man's right.'"

73 Although most cases of conspiracy to defraud involve an agreement to use dishonest means which has the effect of inflicting economic loss on a third party,

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133 [1961] AC 103 at 123.

134 [1961] AC 103 at 124.

135 Commentaries, 18th ed, vol 4 at 247.

the infliction of such loss is not an essential element of the offence. It is sufficient that the conspirators intended to obtain some advantage for themselves by putting another person's property at risk[136] or depriving another person of a lawful opportunity to obtain or protect property[137]. It is also well established that a conspiracy to defraud may be established if the defendants agree to deceive a person into acting or refraining from acting contrary to his or her public duty[138].

74 Thus, in most cases, a conspiracy to defraud arises when two or more persons agree to use dishonest means with the intention of obtaining, making use of or prejudicing another person's economic right or interest or inducing another person to act or refrain from acting to his or her economic detriment. Exceptionally, a conspiracy to defraud will also arise when two or more persons agree to use dishonest means to induce a third person to act or refrain from acting in contravention of the third person's public duty. In some cases, it may be sufficient that the object of the agreement to use dishonest means concerns a non-economic right or interest of a person such as private reputation or personal status. But in the vast majority of cases, conspiracies to defraud concern rights or interests having an economic value.

The mental element in conspiracy to defraud

75 In so far as it is meaningful to speak of *mens rea* in the crime of conspiracy to defraud, *mens rea* means the intention to prejudice the interests of a third

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136 *R v Sinclair* [1968] 1 WLR 1246; [1968] 3 All ER 241; (1968) 52 Cr App R 618; *R v Allsop* (1976) 64 Cr App R 29; *Wai Yu-Tsang v The Queen* [1992] 1 AC 269.

137 *R v Kastratovic* (1985) 42 SASR 59 at 65.

138 *Board of Trade v Owen* [1957] AC 602; *R v Terry* [1984] AC 374; *Withers* [1975] AC 842 and cf *R v Bassey* (1931) 22 Cr App R 160.

person by the use of means that are dishonest. Since the decision of the House of Lords in *R v Scott*[139], however, the notion has grown up[140] that dishonesty is a separate element of the crime of conspiracy to defraud and that the prosecution must prove that the accused persons knew that they were acting dishonestly. In *Scott,* the issue before the House of Lords was whether the offence of conspiracy to defraud could be made out in the absence of proof of deception. Their Lordships held that it could. They upheld a conviction for the offence where the appellant had agreed with employees of cinemas to pay them in return for lending him films which he could copy and sell for commercial distribution. In the course of his speech Viscount Dilhorne said[141]:

> "If, as I think ...'fraudulently' means 'dishonestly,' then 'to defraud' ordinarily means ... to deprive a person dishonestly of something which is his or something to which he is or would or might but for the perpetration of the fraud be entitled."

76 Later in his speech, Viscount Dilhorne said[142]:

> "[I]t is clearly the law that an agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injure some proprietary right of his, suffices to constitute the offence of conspiracy to defraud."

77 These statements were descriptive and not intended to be definitive of the elements of the offence of conspiracy to defraud. They provide no support for the view that dishonesty as such is an element of the offence. Still less do they provide any support for the view that the offence is not proved unless an accused person knows that he was acting in a way that ordinary people would consider dishonest. If that was so, it would follow that, if one of two alleged conspirators did not know that what he was doing was dishonest, both would have to be acquitted because there must be at least two conspirators.

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139 [1975] AC 819.

140 See, for example, Australia, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Model Criminal Code. Ch 3: *Conspiracy to Defraud. Report*, May 1997 at 5, n 11.

141 [1975] AC 819 at 839.

142 [1975] AC 819 at 840.

78 Yet in *Ghosh*[143], the English Court of Appeal took Viscount Dilhorne's statements in *Scott* as meaning that proof of subjective dishonesty was essential to the proof of both theft under the *Theft Act* 1968 (UK) and the common law offence of conspiracy to defraud and that the tests were interchangeable[144]. The test of dishonesty formulated in *Ghosh* has been applied in Australia in numerous cases concerned with conspiracy to defraud[145]. The authors of *Archbold*[146] seem to have been voices in the wilderness in robustly maintaining the view that it is "superfluous" to direct a jury as to dishonesty. In my opinion, however, the authors of *Archbold* are right. A successful prosecution for conspiracy to defraud does not require proof that the accused knew that he or she was acting dishonestly either in a *Ghosh* sense or a wholly subjective sense.

79 Proof of a conscious design on the part of the conspirators to use dishonest means is essential to proving the charge. But this does not mean that the defendants must know that they were acting dishonestly - whether dishonesty is judged by their standards or their knowledge of the standards of ordinary people.

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143 [1982] QB 1053.

144 As a result, the Court said (at 1064):

> "In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.
>
> If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest."

145 *Einem v Edwards* (1984) 12 A Crim R 463 at 470-471; *R v Aston and Burnell* (1987) 44 SASR 436 at 440; *Cheatle v Director of Public Prosecutions* unreported, Supreme Court of South Australia, 2 July 1992; *R v Karounos* (1994) 63 SASR 451 at 485; *Weinel v Fedcheshen* (1995) 65 SASR 156 at 172; *Cornelius & Briggs* (1988) 34 A Crim R 49 at 74; *R v Clark & Bodlovich* (1991) 6 WAR 137 at 150-151; *Bond* (1992) 62 A Crim R 383 at 405-406; *Carter v The Queen* unreported, Supreme Court of Western Australia, 26 September 1997 at 158; *R v Maher* [1987] 1 Qd R 171 at 186; *R v Laurie* [1987] 2 Qd R 762 at 763; *R v Allard* [1988] 2 Qd R 269 at 270, 276; *R v Harvey* [1993] 2 Qd R 389 at 413, 437-439.

146 *Archbold Criminal Pleading, Evidence and Practice,* (1996), vol 2 at 17-102, but they seem to have retreated from this position in the 1997 edition (see 17-62 to 17-64).

In *Churchill*[147] Viscount Dilhorne, speaking for the House of Lords, said that "mens rea is only an essential ingredient in conspiracy in so far as there must be an intention to be a party to an agreement to do an unlawful act". Similarly, in *Meissner v The Queen*[148], a case concerned with conspiracy to pervert the course of justice, Brennan and Toohey JJ and I pointed out that the requisite mental element is satisfied for the purpose of the offence if the accused intends to do acts that have the effect of perverting the course of justice even if he or she has never heard of the expression "perverting the course of justice". If two persons, intending to use means that are dishonest, agree to use those means to obtain an advantage for themselves by putting another person's property at risk, they agree to do an unlawful act. Similarly, if intending to use means that are dishonest they agree to deprive a person of the opportunity to obtain or protect property by those means, they agree to do an unlawful act. In both cases, they are guilty of conspiracy whether or not they know what they knew that those means were dishonest.

80 In the paradigm case of conspiracy to defraud - an agreement to induce persons to buy property by making fraudulent misrepresentations - the charge is made out upon proof that the accused agreed to induce persons to part with their property by the making of statements (by one or more of them or by others) which the accused knew were untrue[149]. Whether or not the accused believed that what they were doing was honest is irrelevant to the charge. Obtaining property by statements which are known to be untrue is the employment of dishonest means. If the accused agree to obtain property by such means, they are guilty of the offence of conspiracy to defraud and the trial judge is entitled and, indeed, bound to direct the jurors to this effect. That is because the accused have the intention to do acts which for the purposes of the crime of conspiracy are unlawful acts and have agreed to do them. Similarly, in *Scott* a conspiracy to defraud the owners of the copyright and distribution rights in the films was made out upon proof that without the consent of the owners the accused had agreed to take and copy films for commercial distribution. None of the Law Lords suggested that the guilt of Scott depended on whether he knew that he was acting dishonestly or whether a jury could find that the taking and copying of the films was dishonest. The Law Lords themselves characterised the taking and copying of the films as dishonest means.

81 The point of law certified by the Court of Appeal for the decision of the House of Lords in *Scott*[150] asked:

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147 [1967] 2 AC 224 at 237.

148 (1995) 184 CLR 132 at 144.

149 *R v Weaver* (1931) 45 CLR 321 at 334-336,356-358.

150 [1975] AC 819 at 822.

"Whether, on a charge of conspiracy to defraud, the Crown must establish an agreement to deprive the owners of their property by deception; or whether it is sufficient to prove an agreement to prejudice the rights of another or others without lawful justification and in circumstances of dishonesty."

82 Viscount Dilhorne said[151]:

"Reverting to the questions certified by the Court of Appeal, the answer to the first question is in my opinion in the negative. I am not very happy about the way in which the second question is phrased although the word 'prejudice' has been not infrequently used in this connection. If by 'prejudice' is meant 'injure,' then I think the answer to that question is yes, for in my opinion it is clearly the law that an agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injure some proprietary right of his, suffices to constitute the offence of conspiracy to defraud."

83 It is for the trial judge to determine whether the facts relied upon by the prosecution, if proved, establish an agreement to use dishonest means sufficient to constitute a conspiracy to defraud - that is to say whether those facts show an agreement to do an unlawful act for the purpose of the offence of conspiracy to defraud[152]. In the context of conspiracy to defraud the prejudicing of another person's interests by dishonest means is an "unlawful act" of the kind described in *Mulcahy*. In determining whether, as a matter of law, the alleged facts show an agreement to use dishonest means to prejudice the interests of a third party, questions of intention, knowledge and claims of right on the part of the defendants will ordinarily be crucial because the common state of mind of the defendants in relation to various acts or omissions will usually be decisive in determining whether the object of the conspiracy was an unlawful act or whether its implementation involved the use of unlawful means. It is then for the jury to determine whether the prosecution has proved the facts that the trial judge has held, as a matter of law, constitute dishonest means for the purpose of a conspiracy to defraud[153].

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151 [1975] AC 819 at 840.

152 Just as it is for the judge to determine under other heads of conspiracy whether the object of the conspiracy was an unlawful act or that the conscious design of the conspirators involved the use of unlawful means.

153 The holding may have been made expressly or by implication when the accused does not raise a "no case" submission.

84 In most cases of conspiracy to defraud, to prove dishonest means the Crown will have to establish that the defendants intended to prejudice another person's right or interest or performance of public duty by:

. making or taking advantage of representations or promises which they knew were false or would not be carried out;

. concealing facts which they had a duty to disclose; or

. engaging in conduct which they had no right to engage in.

In the latter class of case, it will often be sufficient for the Crown to prove that the defendants used dishonest means merely by the Crown showing that the defendants intended to engage in a particular form of wrongful conduct. Proof of an agreement by the defendants to engage in conduct that involves[154] a breach of duty, trust or confidence or by which an unconscionable advantage is to be taken of another will usually be sufficient evidence of dishonest means unless the defendants raise an actual or supposed claim of right or allege that they acted innocently or negligently. In *Scott*, for example, the conspiracy to defraud was made out when the employees without the consent of the owners agreed with the appellant that for reward the employees would give the films to the appellant so that he could copy them for commercial distribution. If the appellant had claimed that he had or believed that he had some contractual or other right to receive and copy the films, the offence would not have been made out unless the prosecution negatived the claim beyond reasonable doubt. In *Adams v The Queen*[155], the Privy Council held that conspiracy to defraud was made out where directors of a corporation (Equiticorp) had failed to disclose that they had bought shares in a company owned by Equiticorp and later sold them back to that company at a substantial profit. By concealing their conflict of interest, they had conspired by dishonest means to deprive Equiticorp of the secret profits they had made. Similarly, company directors who agree to divert the funds of the company for their private purposes will be guilty of conspiracy to defraud unless they raise some claim of right to do what they did and the Crown fails to negative that claim beyond reasonable doubt.

85 It follows that the mental element of the crime of conspiracy to defraud is the intention to prejudice the interests of a third person by the use of means that are

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154 cf *Tyner v United States* 23 App DC 324 (DC Cir 1904) cited in Goldstein, "Conspiracy to Defraud the United States", 68 *Yale Law Journal* 405 at 422-423 (1959).

155 [1995] 1 WLR 52.

dishonest. As Lord Diplock pointed out in *Scott*[156]: "The intended means by which the purpose is to be achieved must be dishonest. They need not involve fraudulent misrepresentation such as is needed to constitute the civil tort of deceit. Dishonesty of any kind is enough." Inevitably, the question of whether those means are dishonest will ordinarily involve other questions concerning the state of mind of the defendants at the time of the agreement - the intention, knowledge or state of belief that is to accompany their acts or omissions[157]. Thus, if the charge is conspiracy to defraud a company by investing its funds in high risk ventures, the beliefs and knowledge of the accused as to the risk involved will be critical in determining whether they used dishonest means. Whether the evidence of their intended means, if proved, constitutes dishonest means for the purpose of the charge of conspiracy to defraud is a question for the trial judge. The beliefs of the accused persons as to whether they thought they were acting honestly are irrelevant[158].

86 Cases involving statutes which make dishonesty an element of an offence are in a different category. "Dishonesty" is an ordinary English word. The meaning and application of ordinary English words in a statute are questions of fact. In a criminal trial involving a statute that makes "dishonesty" an element of an offence, it is for the jury to determine whether the conduct of the accused was dishonest, although in some cases the statutory context may make it imperative for the judge to direct the jury on the meaning of the term[159]. However, in conspiracy to defraud at common law or under a statute which does not make dishonesty an element of the offence (such as ss 86(1)(e) and 86A of the *Crimes Act*), it is for the judge to determine whether the facts alleged constitute the offence of conspiracy to defraud. In determining that issue, a critical question for the judge will be whether the means allegedly intended to be used can be characterised as dishonest so as to make the agreement a conspiracy to defraud for the purpose of that Act or the common law. It is in this way that the element of dishonesty play a part in the

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156 [1975] AC 819 at 841.

157 In the vast majority of cases, this will be inferred from the acts, omissions, statements and declarations implementing the conspiracy.

158 It is perhaps possible that in some case which I cannot presently envisage where no question of theft, deceit, falsity, intention, belief, knowledge, claim of right, concealment or breach of duty, trust or confidence arises, a conspiracy to defraud may nevertheless exist. In that case, it is possible that the jury might have to make a finding as to whether the accused knew they were acting dishonestly. But apart from this very exceptional case, if it exists, the offence of conspiracy to defraud does not involve proof of dishonesty as such.

159 See, for example, *R v Salvo* [1980] VR 401; *R v Bonollo* [1981] VR 633; *R v Brow* [1981] VR 783; *R v Love* (1989) 17 NSWLR 608.

crime of conspiracy to defraud. It is not for juries by defining dishonestly to hold what is or is not a conspiracy to defraud. It is the judge's task to determine whether the facts relied on by the prosecution, or some version of them, constitute a conspiracy to defraud. If the judge finds that they do, it is the jury's task to determine whether the relevant facts have been proved so as to make the accused guilty of the offence.

The trial judge's directions were unduly favourable to the appellant

87 In the present case, the appellant was charged under ss 86(1)(e) and 86A of the *Crimes Act* which, like the common law offence of conspiracy, do not require proof of dishonesty as an element of the offence. However, the trial judge directed the jury in accordance with *Ghosh*. That direction was unduly favourable to the appellant because it required the jury to be satisfied that the appellant must have realised that what he was doing was dishonest by the standards of ordinary and reasonable people.

88 The case for the prosecution was that the appellant agreed with Spong and others to conceal the correct amount of Spong's income by sham mortgage transactions and that they intended by those means to deprive the Commissioner of Taxation of the tax payable on that income or alternatively to make it difficult for the Commissioner to determine the taxable income of Spong. Proof of those facts constituted a conspiracy to defraud the Commonwealth, and the trial judge was bound to tell the jury that the offence was made out if those facts were proved. A direction in the following form would have been appropriate:

> "The basis of the charge that the accused conspired to defraud the Commissioner of Taxation is the claim that he agreed with Spong, Butera and Coppens to defraud the Commissioner of Taxation of income tax that was or might be payable on the monies received by Spong. To establish the offence, the Crown must prove three matters. First, that the accused, Spong, Butera and Coppens knew that Spong had received monies which they believed were or might be taxable income. Second, that they agreed and intended to use sham mortgage transactions in order to conceal from the Commissioner of Taxation that Spong had received those monies. Third, in entering into the agreement they intended to prevent the Commissioner from collecting the tax that was or might be payable on those monies or alternatively they intended to make it more difficult for the Commissioner to determine the taxable income of Spong.
>
> The Crown does not have to prove that all of the alleged conspirators entered into the agreement. But the Crown does have to prove that at least one of them entered into an agreement with the accused with the intention to use sham mortgage transactions to conceal the fact that Spong had received these monies and that that person and the accused knew or believed those

> monies might be taxable income. The Crown must also prove that that person and the accused intended to prevent the Commissioner from collecting the income tax that was or might be payable on those monies or alternatively intended to make it more difficult for the Commissioner to determine the taxable income of Spong."

89 The learned trial judge did not direct the jury in terms in accordance with these suggested directions, but with one exception he did so in substance. As I have pointed out, his Honour instructed the jury that there were five elements which the Crown had to prove:

> "First, an agreement to defraud which had as its outcome or incidental to its outcome, a depriving of the Commissioner of Taxation of income tax payable on monies of Mr Spong or the risk of that deprivation.
>
> Secondly, that the accused man was party to that agreement. Thirdly, that the accused man intended to defraud the Commissioner of Taxation. That is that he knew that the course of conduct agreed to be embarked upon involved the deprivation of the Commissioner of Taxation of that income tax or the risk of that deprivation. Four, that what was intended to be done was dishonest according to the standard of ordinary reasonable and honest people in the community and fifthly, the accused knew that what was intended was dishonest by those standards."

90 In my view, given that the statutory provisions under which the appellant was charged did not require proof of dishonesty as an element of the offence, the trial judge should not have directed the jury that the prosecution had to prove the fourth and fifth elements. His Honour should have directed the jury that they could find the accused guilty if the prosecution has established beyond reasonable doubt that the accused and at least one other of the parties to the alleged agreement intended to deprive the Commissioner of Taxation of the income tax payable on monies of Mr Spong or to prejudice the collection of that income tax by using sham mortgage transactions to conceal Spong's ownership of the money. On the undisputed facts of the case and the jury's finding that there was a conspiracy, it is plain that Butera, Coppens and Spong or one or more of them were parties to an agreement with the appellant and had the relevant knowledge, belief and intention.

91 Instructing the jury in accordance with *Ghosh* therefore constituted no miscarriage of justice. Indeed, by requiring the prosecution to prove the fourth and fifth of the five elements to which his Honour referred, the judge's charge to the jury was unduly favourable to the appellant.

92 The appeal must be dismissed.

93 GUMMOW J. The appeal should be dismissed. I agree with the reasons of McHugh J.

94 KIRBY J. This appeal comes from the Court of Appeal of the Supreme Court of Victoria[160]. In it, this Court is required to determine a complaint about the accuracy of the instruction given to a jury in respect of a charge of conspiracy to defraud the Commonwealth arising in a criminal trial held in the County Court at Melbourne[161].

Judicial instructions on the meaning of dishonesty

95 The primary judge instructed the jury that one element of the offence was a dishonest intention on the part of the accused. He proceeded to direct the jury in accordance with the two-stage test established by the English Court of Appeal in *R v Ghosh*[162]. That test introduces so-called "objective considerations" into the notion of dishonesty. It requires the jury to have regard to their assessment of whether what was done by the accused was dishonest according to the ordinary standards of "reasonable and honest"[163] people. The appellant complains that this was a serious misdirection which deprived him of a trial according to law or occasioned a substantial miscarriage of justice necessitating a retrial[164]. According to him, the proper inquiry (and hence the legally accurate instruction) would have addressed the jury's attention solely to his beliefs as to whether what he had done was dishonest, or involved means which he knew were dishonest, at the time of his conduct[165].

96 The appeal affords this Court an opportunity to resolve a question which, for some time, has troubled the theory and practice of the criminal law. That question concerns precisely what the prosecution must prove in offences involving

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160 *R v Peters* [1997] 1 VR 489.

161 County Court at Melbourne, Charge to the Jury by Judge Hassett, 4 October 1995 at 1701-1704 of transcript.

162 [1982] QB 1053.

163 [1982] QB 1053 at 1064. In *R v Feely* [1973] QB 530 at 538, the phrase used was "ordinary decent people". Use of the word "honest" has been criticised as tautological: see Griew, "Dishonesty: The Objections to Feely and Ghosh" [1985] *Criminal Law Review* 341 at 342. In *R v Lawrence* [1997] 1 VR 459 at 470, Callaway JA said: "The touchstone is not what an ordinary reasonable person would regard as dishonest but rather the ordinary *standards* of reasonable *and honest* people."

164 *Wilde v The Queen* (1988) 164 CLR 365 at 373; *S v The Queen* (1989) 168 CLR 266 at 282; *Crofts v The Queen* (1996) 186 CLR 427 at 452.

165 His principal defence was that he was not involved in the conspiracy at all.

dishonesty. As that issue is raised in a very large proportion of criminal charges[166], the question is one of considerable practical as well as legal importance. It has attracted a great deal of judicial[167] and academic[168] attention. In varying contexts[169], decisions have been reached which support reference to the "ordinary standards of reasonable and honest people" required by *Ghosh*[170]. But in other cases opinions have been expressed which suggest that such reference is erroneous and a distraction from the fundamental task of the jury which is to determine the "subjective" intention of the accused and whether, at the relevant time, that intention was dishonest[171].

97 In Victoria, different instructions to juries are now required by judicial authority in respect of offences charged under the theft provisions of the

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166 Griew, "Dishonesty: The Objections to Feely and Ghosh" [1985] *Criminal Law Review* 341 at 341.

167 See eg *R v Love* (1989) 17 NSWLR 608 at 614; *R v Williams* [1985] 1 NZLR 294 at 307-308.

168 See eg Campbell, "The Test of Dishonesty in *R v Ghosh*" (1984) 43 *Cambridge Law Journal* 349; Griew, "Dishonesty: The Objections to Feely and Ghosh" [1985] *Criminal Law Review* 341; Halpin, "The Test for Dishonesty" [1996] *Criminal Law Review* 283.

169 The Crown suggested that a different test might be applicable where "dishonestly" appeared in legislation and where it did not. The question was raised as to whether there was a distinction to be made between (a) the adverb "dishonestly" modifying designated conduct; (b) the adjective "dishonest" qualifying the means used by an accused person; and (c) the offence involving the notion of dishonesty as one ingredient.

170 See eg *Einem v Edwards* (1984) 12 A Crim R 463 at 470-471; *R v Maher* [1987] 1 Qd R 171 at 186-187; *R v Laurie* [1987] 2 Qd R 762 at 763; *R v Aston and Burnell* (1987) 44 SASR 436 at 440; *Cornelius & Briggs v The Queen* (1988) 34 A Crim R 49 at 74-75; *R v Edwards* [1988] VR 481 at 489; *R v Allard* [1988] 2 Qd R 269 at 270-271, 276-277; *R v Clark and Bodlovich* (1991) 6 WAR 137 at 150; *Bond v The Queen* (1992) 62 A Crim R 383 at 405-406; *R v Harvey* [1993] 2 Qd R 389 at 413-414, 437-439; *R v Karounos* (1994) 63 SASR 451 at 485; *Weinel v Fedcheshen* (1995) 65 SASR 156 at 172-173; *Carter v The Queen* unreported, Court of Criminal Appeal of Western Australia, 26 September 1997 at 156-158; *R v Lacombe* (1990) 60 CCC (3d) 489 at 492-495; *R v Zlatic* (1991) 65 CCC (3d) 86 at 94; cf *US v Collins* 78 F 3d 1021 at 1038 (1996); *US v Khalife* 106 F 3d 1300 at 1303 (1997).

171 *R v Love* (1989) 17 NSWLR 608 at 614-615; *Condon v The Queen* (1995) 83 A Crim R 335 at 346; *R v Williams* [1985] 1 NZLR 294 at 308.

Crimes Act 1958 (Vic)[172] from those required in relation to other crimes of dishonesty, notably the federal offence in question in this appeal[173]. Because it is not uncommon to find, in the one indictment, successive counts based respectively upon the State *Crimes Act* or *Code* and applicable federal offences, the difficulty of providing clear, simple and accurate instructions to a jury about the approach which they should take to the issue of dishonesty is plain. The differing approaches in Victoria are reflected in other jurisdictions of Australia[174]. The differences impose a significant burden on trial judges and on juries.

98 The history of the offence of conspiracy to defraud and the course which past authority has taken in this country and elsewhere are extremely complicated, as the reasons of the other members of this Court demonstrate. In my view it is the duty of this Court, if possible, to resolve the differences and to provide clear guidance upon the approach which is to be taken in the case of that offence. It can only do this by a clear-sighted adherence to the basic principles of the criminal law – one of the most fundamental of which is the requirement that ordinarily, to establish criminal wrongdoing, the accused must be shown by the prosecution to have done the acts charged with a criminal intention. The objective act must be shown to coincide with the subjective intention of the accused.

Background facts

99 Mr Philip Peters (the appellant) is a solicitor. In 1983 he accepted instructions from a client, Mr Larry Spong ("the client"). At the relevant time the client, in concert with others, was involved in illegal drug trafficking. These

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172 The term "dishonestly" is contained, in terms, in the statutory provisions relating to theft and obtaining by deception. These provisions were added to the *Crimes Act* 1958 (Vic) by the *Crimes (Theft) Act* 1973 (Vic) which adopted in substance the provisions of the *Theft Act* 1968 (UK) (ss 72, 81 and 82 of the Victorian Act mirror ss 1(1), 15 and 16 of the English Act respectively); cf *R v Salvo* [1980] VR 401 at 405-406, 424.

173 *Crimes Act* 1914 (Cth), s 86(1)(e) from 1 June 1983 (the first date on which the conduct was alleged to have taken place) to 24 October 1984, and s 86A from 25 October 1984 to 30 September 1987 (the last date on which the conduct was alleged to have taken place). Section 86A has since been repealed (from 15 September 1995) by the *Crimes Amendment Act* 1995 (Cth), s 8. The offence is now dealt with under the *Crimes Act* 1914 (Cth), ss 29D and 86.

174 For a description of the different approaches adopted in Australia, see Commonwealth, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code. Chapter 3: Theft, Fraud, Bribery and Related Offences. Final Report* (1995) at 13-29.

activities yielded substantial profits which the client and his colleagues wished to conceal from the Federal Commissioner of Taxation. The client's *modus operandi* was to acquire real property. When in October 1983 it became known that the client and an accomplice, also a solicitor, were under police surveillance, the appellant was retained. He received the conveyancing files from the accomplice. The appellant then acquired a shelf company to be the purchaser of the real estate. He became a shareholder and director of that company, along with the client. The latter used one of several aliases which the appellant knew to be false. A mortgage transaction was entered which the appellant must also have known to be a sham because no moneys were advanced under it. Moneys paid in discharge of the mortgage were then repaid to the client. The appellant acted as solicitor in relation to a series of the sales to genuine purchasers. The details are explained in the reasons of the other members of this Court. Eventually the Commissioner of Taxation came to know of the dealings. He issued an assessment to the client. After some dispute, this resulted in the payment by the client of some $440,000 in unpaid taxation, penalties and interest. The arrangement thus failed to achieve its intended goal of tax evasion.

100 In September 1995 the appellant appeared for trial before the County Court at Melbourne. The indictment contained two counts. The first alleged that, between 1983 and 1987, the appellant had conspired with the client and other named persons to defraud the Commonwealth, namely the Commissioner of Taxation[175]. The second count alleged a conspiracy, with common but not identical persons, to pervert the course of justice by concealing the proceeds of the client's illegal drug trafficking.

101 The appellant pleaded not guilty to both counts. He stood his trial. In October 1995 the jury found him guilty on the first count. They acquitted him on the second. He was convicted on the first count and sentenced to imprisonment for 18 months[176]. The appellant was granted bail both by the Court of Appeal and by this Court, pending the outcome of his appeals.

102 I pause to note that such a grant of bail is not the usual practice, at least in this Court. Whilst I welcome the provision of bail in appropriate cases, where the utility of an appeal would otherwise be lost to a prisoner by delay in the hearing, it would be a matter of concern if this privilege, defensive of liberty, were granted more readily to a professional person, such as a solicitor like the appellant, but not

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175 Contrary to the *Crimes Act* 1914 (Cth), s 86(1)(e) until 24 October 1984 and thereafter contrary to s 86A of the same Act.

176 It was ordered that he be released upon a good behaviour recognisance after serving four months of that sentence.

to another accused who may have no less legal merit and for whom liberty is just as precious.

103 In November 1996 the Court of Appeal dismissed the appellant's application for leave to appeal against his conviction and sentence[177]. The grounds upon which the appeal to this Court were argued were confined to those which complained that the primary judge had erred in directing the jury that the element of dishonesty in the charge of conspiracy to defraud the Commonwealth, contained in the first count, had both an objective and subjective component. The appellant complained that the Court of Appeal had erred in failing to correct the primary judge's error and to hold that the element of dishonesty was subjective only[178]. The substantive defence of the appellant at the trial was a complete denial that he was party to any conspiracy with the client and the client's accomplices. However, in relation to the issue of dishonesty, regarded as inherent in the charge of conspiring to defraud the Commissioner of Taxation, the appellant's case was also that he had acted honestly and, as he believed, as any solicitor would have done in the circumstances. The appellant knew that the transactions in which he had acted for the client were a sham. He knew that proceeds would be re-paid to the client. However, his case was that "he did not, by that means, join in any illegal conspiracy of the kind alleged, that he was merely acting as a solicitor"[179].

104 Inherent in the acquittal of the appellant on the second count is a conclusion on the part of the jury that the appellant did not know, at the time he was acting for the client as his solicitor, that the client was involved in illegal drug trafficking. However, inherent in the conviction on the first count is the jury's conclusion that the Crown had proved that the appellant did know that the client and his accomplices were conspiring to defraud the Commissioner of Taxation and that that was the purpose of their sham transactions. There was an abundance of evidence to sustain that conclusion as a matter of fact, as was properly conceded for the appellant. However, the appellant's case on appeal was that he was entitled to have the jury consider his assertions that he had merely acted as the client's solicitor and had not acted dishonestly. He submitted that the jury should have considered these assertions with the benefit of accurate instructions on the law which the jury were to apply in evaluating the Crown's case against him.

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177 [1997] 1 VR 489.

178 The formal grounds of appeal complained that the Court of Appeal had erred in applying *R v Ghosh* [1982] QB 1053 (ground 2(c)) and in failing to apply *R v Salvo* [1980] VR 401 (count 2(d)).

179 See County Court at Melbourne, Charge to the Jury by Judge Hassett, 4 October 1995 at 1709 of transcript.

105 A jury might conclude that the appellant had been naive, foolish or stupidly anxious to please a substantial new client. But unless they were convinced that he was knowingly dishonest in relation to the fraud on the Commissioner of Taxation, it was the appellant's submission that the jury could not convict him of participating in a conspiracy to defraud the Commissioner. The dishonesty was inherent in the fraud necessary to the object of the conspiracy to defraud charged. It implied the intentional choice of dishonest means to achieve the purpose of the conspiracy. For want of a proper direction on this element of the offence, the appellant had not had a trial according to law. Alternatively, he had lost a real chance of acquittal and so suffered a substantial miscarriage of justice.

The charge to the jury

106 The primary judge addressed the jury on the question of dishonesty. He did so in an extended passage towards the close of his charge. It is worth setting out in full what he said[180]:

> "The final element of the charge involves establishing that the accused was acting dishonestly. In determining whether the Prosecution has proved that the accused was acting dishonestly, there are two considerations to which you must have regard. *The first involves an objective test and the second a subjective test*. It is a matter for you to decide whether what was agreed to be done was dishonest. *In deciding this, you apply what in your view is the current standard of ordinary and reasonable honest people.*
>
> You have been drawn randomly from the community and are a body that can determine that standard of honesty. You apply what you consider to be the current standard of ordinary reasonable and honest people in our community. It is for you to say whether what the accused did or meant to do was dishonest by that standard. As you will observe, that is an objective test; *what would ordinary reasonable honest people think?*
>
> If you conclude that what the accused did or meant to do was dishonest according to that standard, then you go on to apply a subjective test; whether the accused himself knew that what was to be done was dishonest by that standard. The Crown must prove that the accused realised that what he was doing was dishonest by that standard. *In other words, that the accused believed he was not acting honestly according to the standards of ordinary reasonable and honest people.*

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180 County Court at Melbourne, Charge to the Jury by Judge Hassett, 4 October 1995 at 1701-1703 of transcript (emphasis added).

> So you see it would not be an answer to a charge of this kind for an accused to say, well, I thought that I was not acting dishonestly. I thought it was all right to do, even though I know that other people, *ordinary honest reasonable members of the community would regard it as dishonest*. You cannot get out of a charge of this kind by saying, I thought it was okay. It is a question of what the ordinary member of the community would perceive and whether the accused knew that the ordinary member of the community would perceive it as being dishonest.
>
> ... The dishonesty which is here to be considered is whether the accused in being a party to what was intended to be done, assuming you find that he was such a party, believed or realised that in depriving the Commissioner of Taxation of income tax or risking that deprivation, he was acting dishonestly according to the *standards of ordinary reasonable and honest people in the community*."

107 After being charged to consider their verdict, the jury returned to ask the primary judge to repeat his directions on the key elements of each charge[181]. In an abbreviated form not materially different, the trial judge repeated his instructions in terms similar to those just set out[182].

108 There was no application for redirection in relation to the foregoing instructions. However, this is understandable because they conformed to the then applicable state of judicial authority in Victoria[183]. Since the Court of Appeal delivered judgment in this case, it has once again affirmed that, in respect of a count based on federal law, charging the accused with defrauding the Commonwealth[184], a jury in Victoria are to be "directed in accordance with the conception of dishonesty to be found in *R v Ghosh*"[185]. In *Ghosh* itself, it was contemplated that the two stage instruction, there expressed, would be applicable

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181 County Court at Melbourne, Charge to the Jury by Judge Hassett, 4 October 1995 at 1735 of transcript.

182 County Court at Melbourne, Charge to the Jury by Judge Hassett, 4 October 1995 at 1740-1741 of transcript.

183 *R v Edwards* [1988] VR 481 at 489; *R v Lawrence* [1997] 1 VR 459 at 466-467.

184 In that case the *Crimes Act* 1914 (Cth), s 29D.

185 *R v Harris* unreported, Court of Appeal of Victoria, 13 February 1997 at 3 per Callaway JA (Phillips CJ and Harper AJA concurring). In that case the primary judge had charged the jury in accordance with *R v Salvo* [1980] VR 401. This was held to be a misdirection. On the two counts of defrauding the Commonwealth, a retrial was ordered.

to, and should be observed in the case of, the crime of conspiracy to defraud[186]. Unless corrected by this Court or by legislative amendment, it is clear that the courts of Victoria will continue to hold themselves bound, in cases such as the present, to direct juries to approach the question of dishonesty by applying the test in *Ghosh.* This appears to have been recognised by the primary judge. Although some criticisms were made of the language of his charge, measured against *Ghosh,* those criticisms are without substance. If it was appropriate to give directions on the question of dishonesty as established by *Ghosh*, the directions given in this case were those which the law required. This was so although it was recognised that the approach adopted by the Victorian courts in this regard brought the law in that State into apparent conflict with recent authority in New South Wales[187].

Applicable legislation

109 As I have stated, the offence of which the appellant was convicted was that of conspiracy to defraud the Commonwealth. When the *Crimes Act* 1914 (Cth) ("the Act") was first enacted it did not contain that offence. The offence was added in 1915[188] as s 86(e) of the Act. In 1960[189], the provision was re-enacted as s 86(1)(e), and was extended to cover conspiracy to defraud a public authority under the Commonwealth. In 1984, the sub-par was deleted and replaced by s 86A[190]. At the same time, s 29D was inserted in the Act providing, for the first time, a substantive offence of defrauding the Commonwealth or a public authority under the Commonwealth[191].

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186 *R v Ghosh* [1982] QB 1053 at 1059 per Lord Lane CJ for the court.

187 See *Condon v The Queen* (1995) 83 A Crim R 335 at 346. See also *R v Love* (1989) 17 NSWLR 608 at 614-615. The conflict was noted by Tadgell JA in the Court of Appeal. See *R v Peters* [1997] 1 VR 489 at 491 where it is stated that *Condon* was referred to by counsel but "without perceptible enthusiasm".

188 *Crimes Act* 1915 (Cth), s 2 (which was originally enacted to apply only until six months after the end of the war, but remained in force by virtue of the *War Precautions Act Repeal Act* 1920 (Cth), s 13).

189 *Crimes Act* 1960 (Cth), s 59.

190 By the *Statute Law (Miscellaneous Provisions) Act (No 2)* 1984 (Cth), s 2(9) and Sch 1.

191 The penalties prescribed were increased when s 86A replaced s 86(1)(e) in 1984 (*Statute Law (Miscellaneous Provisions) Act (No 2)* 1984 (Cth), s 2(9) and Sch 1), and again in 1986 (*Statute Law (Miscellaneous Provisions) Act (No 1)* 1986 (Cth), Sch 1). In 1993, the prescribed penalties were converted into "penalty units" (*Crimes*

(Footnote continues on next page)

110 Because the count of the indictment against the appellant alleged a conspiracy lasting from June 1983 until September 1987, it was necessary to provide in the indictment for the supervening amendment of the Act. This was done by alleging that, until 24 October 1984 (the day before the 1984 amendments came into force) the appellant's offence was committed contrary to s 86(1)(e) of the Act and, thereafter, contrary to s 86A of the Act[192].

111 The Act has never defined conspiracy to defraud or the word defraud or the concept of intent to defraud. However, by s 4 of the Act, it is provided that the principles of the common law with respect to criminal liability apply, subject to the Act, in relation to offences against the Act. Accordingly, in the absence of any express definition of "conspiracy" or "defraud", in the provisions of the Act under which the appellant was charged, it was necessary to pay regard to the common law in order to determine what the crime of conspiracy to defraud entailed. It is through such common law notions that the element of dishonesty has been accepted as inherent in the crime of conspiracy to defraud. The word does not appear in the definition of the offence in the Act. In this respect, the applicable offence is different from the provision in the *Crimes Act* 1958 (Vic) considered in *R v Salvo*[193] where the word "dishonestly" does appear. However, there is a long history to the offence and much early and recent authority by which to guide the approach of this Court as to its elements.

112 An explanation of what the common law takes to be a conspiracy to defraud is found in the speech of Viscount Dilhorne in *R v Scott*[194]. His Lordship emphasised, as many judges have done since[195], that it is both impossible to formulate an exhaustive definition of the meaning of the word "defraud" and

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Legislation Amendment Act 1992 (Cth), ss 19, 52 and Sch 1). In 1995 the Act was further amended (*Crimes Amendment Act* 1995 (Cth), s 8). Section 86A was repealed and replaced by a new s 86, sub-s (2) of which created an offence of conspiracy to commit an offence against s 29D.

192 No point was raised concerning the form of the first count of the indictment, specifically the averment that the Commissioner of Taxation was the Commonwealth for the purposes of the relevant section.

193 [1980] VR 401. The Full Court of the Supreme Court of Victoria was there considering s 81(1) of the *Crimes Act* 1958 (Vic) which provides in part: "A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, is guilty of an indictable offence". See also ss 82, 83.

194 [1975] AC 819 at 838-839.

195 See for example *R v Kastratovic* (1985) 42 SASR 59 at 62 per King CJ.

unwise to make the attempt. Nevertheless, building on a conclusion of the Criminal Law Revision Committee in England that "fraudulently" means "dishonestly", his Lordship declared in terms which I consider that this Court should accept[196]:

> "'[T]o defraud' ordinarily means, in my opinion, to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled."

113 The present case proceeded at trial, and on appeal, including, substantially, in this Court, on the footing that one element of the charge of conspiracy to defraud was the intentional use of dishonest means on the part of the appellant. With all respect to those of a different view, and in light of longstanding Australian and overseas authority, I do not consider that this Court should take a different approach, at least without the specific authority of statute. The Act gives no such authority. In so far as any reform of the Act is in prospect, there seems little likelihood that the Parliament would be invited to amend the Act to remove the element of dishonesty as superfluous to the offence[197]. It is not superfluous. Were it so, many commercial and other agreements which legitimately aim at disadvantaging a competitor would be liable to prosecution as conspiracies to defraud. This is so obviously contrary to principle, and to the scope of the offence contemplated by the Parliament that it would require clear legislative language to sustain such a significant departure from past authority.

114 The obligation of the prosecution to prove the element of dishonesty on the part of a conspirator, in order to make good the charge of conspiracy to defraud, conformed to legal authority both in England[198] and Australia[199]. Although a faint effort was made during argument in this Court to suggest otherwise, I believe that the nouns "fraud" and "dishonesty", and the corresponding adverbs "fraudulently"

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196 [1975] AC 819 at 839.

197 See Commonwealth, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code. Chapter 3: Conspiracy to Defraud Report* (1997) at 5, n 11, cited in the reasons of Toohey and Gaudron JJ. The *Criminal Code Act* 1995 (Cth), recently enacted by the Parliament to codify the general principles of criminal responsibility under laws of the Commonwealth, does not deal with this issue.

198 *R v Ghosh* [1982] QB 1053 at 1059.

199 *R v Glenister* [1980] 2 NSWLR 597 at 604-607; *R v Horsington* [1983] 2 NSWLR 72 at 76; *R v Walsh and Harney* [1984] VR 474 at 478; *Ward & Stonestreet v The Queen* (1996) 88 A Crim R 159 at 162.

and "dishonestly", may be used interchangeably[200]. In the context of a charge of conspiracy to defraud, that conclusion stands to reason. What is alleged is not simply entry into an unlawful agreement. It is an unlawful agreement of a particular kind, namely one involving dishonesty on the part of the alleged conspirator because the object is to defraud the victim of the conspiracy of what is properly its right or entitlement. It follows that, respectfully, I cannot agree with what McHugh J has written about the elements of the offence or the charge that should have been given to the jury about those elements. With all due deference, I consider that this alters settled and accepted law and does so in a way contrary to important and basic principle. Dishonesty is an element of conspiracy to defraud. It must therefore be accurately explained to a jury considering the evidence on such a charge.

Defining dishonesty

115 The difficulty which the law faces in giving precise content to the notion of "dishonesty" is well described by King CJ in *R v Kastratovic*[201]:

> "Human ingenuity in devising dishonest schemes designed to produce an advantage to one person at the expense of another or of the community at large is notoriously fecund. The courts have been understandably reluctant to place themselves in the position of being unable to punish conduct which should by commonly accepted standards be stigmatised as fraudulent by reason of the constraints of an *a priori* definition framed without thought of conduct of that particular kind."

116 It did not take long after the passage of the English *Theft Act* in 1968, with its express use of the adverb "dishonestly", for the problem to arise which has troubled this area of the law ever since. Prior to that time, there does not appear to have been any comprehensive attempt by judges to define "dishonest" or its adverbial variant "dishonestly". It was enough to state the word. But the use of "dishonestly" in the *Theft Act* resulted in a succession of valiant attempts at

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200 *R v Scott* [1975] AC 819 at 839; *R v Glenister* [1980] 2 NSWLR 597 at 604-605; *R v Lawrence* [1997] 1 VR 459 at 466; cf *Balcombe v De Simoni* (1972) 126 CLR 576 at 583-584, 588, 594-595.

201 (1985) 42 SASR 59 at 62.

definition and the equal number of suggestions that the effort to find a comprehensive definition was futile. The basic problem was, and still is[202]:

> "how instrumental the defendant's own views and beliefs are in selecting the particular standard by which his conduct is to be judged. At one extreme it is thought that it is only fair to find the defendant culpable when he has failed to live up to standards that he himself subscribes to - commonly referred to as a *subjective* approach. At the other extreme it is thought necessary for society to impose standards upon its members irrespective of their own individual views and beliefs - the *objective* approach."

117 The initial responses to the *Theft Act* in England quickly demonstrated the ambivalence which has persisted to the present time. In June 1972, in *R v Gilks*[203], the English Court of Appeal upheld a direction to a jury instructing them to consider whether the defendant "thought he was acting honestly or dishonestly". This endorsed a subjective approach. However, soon afterwards, in *R v Feely*[204], that Court suggested objective criteria, proposing that the jurors consider "the current standards of ordinary decent people".

118 Each of these approaches to what the concept of dishonesty involved in this connection had disadvantages. To require the jury (or any tribunal of fact) to take into account the standards of ordinary, decent people involves a departure from the fundamental principle of our criminal law that the criminal quality of the accused's conduct is generally to be judged by reference to his or her subjective intention and not to an imputed intention, objectively derived. This Court has steadfastly adhered to that principle[205]. Yet to evaluate dishonesty solely by reference to the subjective intention of the accused might surrender notions of dishonesty to the absurd, but genuine, beliefs of the particular accused. It would afford a defence in law to Robin Hood, because of his subjective beliefs about the moral, social or political justifications of his otherwise unlawful conduct[206].

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202 Halpin, "The Test for Dishonesty" [1996] *Criminal Law Review* 283 at 285 (citations omitted). The use of "subjective" and "objective" has been criticised. See *R v Caldwell* [1981] 2 WLR 509 at 515-516; [1981] 1 All ER 961 at 966.

203 *R v Gilks* [1972] 1 WLR 1341 at 1345; [1972] 3 All ER 280 at 283.

204 [1973] QB 530 at 538.

205 cf *Parker v The Queen* (1963) 111 CLR 610 at 632.

206 Halpin, "The Test for Dishonesty" [1996] *Criminal Law Review* 283 at 287. This was a concern of Lord Lane in *R v Ghosh* [1982] QB 1053 at 1064 and has been a constant theme of the writing on the topic. See Smith, *The Law of Theft*, 7th ed

(Footnote continues on next page)

119 The resolution of this quandary was extremely important, not simply for the elaboration of the word "dishonestly" appearing in the English *Theft Act.* The use of that word merely provided the occasion for the debate. As the concept of dishonesty was so pervasive, the approach of the law in resolving the debate between the proponents of the so-called objective and subjective schools was both important and urgent.

120 *R v Ghosh* represented the attempt by the English Court of Appeal to achieve a compromise which would at once prevent "conduct to which no moral obloquy could possibly attach"[207] from being regarded as dishonest whilst at the same time avoiding the other extreme by which an exclusively subjective approach might permit sincere, but unacceptable, extremists imposing their own conceptions of honesty on others and escaping criminal liability for conduct wholly unacceptable to society.

121 The result of this compromise was the formulation of the two stage test. To find that the accused had acted dishonestly (save possibly for cases of obvious dishonesty[208]) required affirmative answers to two questions:

1. Was what was done dishonest according to the ordinary standards of reasonable and honest people?

2. Must the defendant have realised that what he or she was doing was dishonest according to those standards?

122 In *Feely*, which preceded *Ghosh,* Lawton LJ said[209]:

(1993) at 64-65; Griew, "Dishonesty: The Objections to Feely and Ghosh" [1985] *Criminal Law Review* 341 at 353.

207 *R v Ghosh* [1982] QB 1053 at 1063.

208 [1982] QB 1053 at 1064 per Lord Lane ("In most cases, where the actions are *obviously dishonest* by ordinary standards, there will be no doubt about it." (emphasis added)); cf *Roberts v The Queen* (1985) 84 Cr App R 117 at 123; Smith, *Property Offences* (1994) at 276-279; Griew, *The Theft Acts*, 7th ed (1995) at 74-75; Smith, *The Law of Theft*, 7th ed (1993) at 64-65; *Archbold. Criminal Pleading, Evidence and Practice* (1994), vol 2 at par 21-32.

209 [1973] QB 530 at 537-538. It is not unusual for judges to foresake a definition of a word of malleable meaning and to settle for a description. See for example *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 at 223 per Lord Macnaghten on the meaning of "goodwill".

> "We do not agree that judges should define what 'dishonestly' means. This word is in common use ... Jurors, when deciding whether an appropriation was dishonest can be reasonably expected to, and should, apply the current standards of ordinary decent people."

It is in this passage, in *Feely,* that the seeds may be found of the controversies that have continued ever since. Should an attempt be made to define what honestly and its variants connote? Or should its meaning in the particular context be left to the tribunal of fact, having regard to all of the evidence of the particular case? Should the "current standards of ordinary decent people" or "reasonable and honest people" be introduced as an instruction to the tribunal of fact so that such considerations are taken into account as a check against unbridled subjectivism? Or is it enough to assume that jurors and other tribunals of fact, because of their nature and functions, will invariably bring the "current standards of ordinary decent people" or "reasonable and honest people" to bear upon the evidence and arguments on behalf of the accused concerning his or her subjective intentions[210]?

123 In its context, it seems fairly clear to me that Lawton LJ, in the passage cited from *Feely*, was not proposing the imposition of a legal gloss on the meaning of dishonestly so that the concept was to be judged by reference to objective standards. That suggestion would have been completely inconsistent with the opening passage of his remarks where it was proposed that no judicial definition of "dishonestly" should be proffered at all. All that his Lordship was saying was that, as a matter of commonsense, the community could trust juries to apply "current standards of ordinary decent people". It could do so because juries, by hypothesis, were generally made up of just such people - ordinary and decent; reasonable and honest. Adopting the approach in *Feely* had the advantage of avoiding judicial attempts to define comprehensively the notion of dishonesty, a

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210 cf *R v O'Connor* (1980) 146 CLR 64 at 79 per Barwick CJ and his reference to the opinion of Starke J in *R v O'Connor* [1980] VR 635 at 647.

task which has eluded legislatures[211], law reform bodies[212], official committees[213] and judges[214].

124 Although there were obvious advantages in the approach favoured by Lawton J in *Feely*, that approach was significantly altered by the ruling in *Ghosh.* In the place of judicial silence, a two-stage test was adopted. In the place of an acceptance that the jury would, in general terms, reflect community standards concerning honesty and dishonesty, there was substituted the requirement for an express instruction to juries (and other tribunals of fact) that they must conceive what "the ordinary standards of reasonable and honest people" were. They must measure what they found to have been done against those standards. Moreover, if what was done was dishonest by those standards, the jury were then instructed to consider not the subjective beliefs of the accused as to the honesty or dishonesty of the conduct said to constitute the offence, but "whether the defendant himself *must* have realised that what he was doing was *by those standards* dishonest"[215].

125 The *Ghosh* approach has been severely criticised as an inept attempt to "reintroduce order into a subject that had become inconsistent and confused"[216]. Its "fundamental flaw" has been argued to be a confusion between subjective and objective elements of the offences to which it applied[217]. Instead of leaving the

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211 See Commonwealth, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code. Chapter 3: Theft, Fraud, Bribery and Related Offences. Final Report* (1995) at 15.

212 South Australia, Criminal Law and Penal Methods Reform Committee, *Fourth Report: The Substantive Criminal Law* (1977) at 161-162.

213 Commonwealth, *Review of Commonwealth Criminal Law, Fourth Interim Report* ("*Gibbs Committee Report*") (1990) at 132-133; noted Commonwealth, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code. Chapter 3: Theft, Fraud, Bribery and Related Offences. Final Report* (1995) at 25.

214 *R v Kastratovic* (1985) 42 SASR 59 at 62-63, 90-92.

215 [1982] QB 1053 at 1064 (emphasis added).

216 Griew, "Dishonesty: The Objections to Feely and Ghosh" [1985] *Criminal Law Review* 341 at 352.

217 Campbell, "The Test of Dishonesty in *R v Ghosh*" (1984) 43 *Cambridge Law Journal* 349 at 352-354; Halpin, "The Test for Dishonesty" [1996] *Criminal Law Review* 283 at 287; Elliott, "Dishonesty in Theft: A Dispensable Concept" [1982] *Criminal Law*

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evaluation, as Lawton LJ proposed in *Feely,* to the good sense of the jurors themselves because they presumably reflected ordinary decent standards, it introduced "a partially idealised test with a necessary component of moral evaluation which will vary from jury to jury"[218]. Either, in practice, juries would ignore the direction to conceive the fictitious "ordinary standards of reasonable and honest people" separate from their own standards or they would subsume those standards to their own, cutting through the fiction and drawing on their own experience and opinions despite the judicial direction. If this were what happened in practice, it would make each of the two stages of the *Ghosh* test for dishonesty futile at best and misleading at worst.

Application and rejection of the English tests

126 Australian authorities since *Feely* and *Ghosh* have reflected the foregoing debates. In *R v Salvo*[219] a majority of the Victorian Court of Criminal Appeal declined to follow *Feely. Salvo* was followed in Victoria in *R v Bonollo*[220] and *R v Brow*[221]. Dealing with the problem in *Salvo,* it was proposed that "dishonestly" imported "the notion that the actor is conscious that he has no right to deprive the other of that of which the latter is in fact being deprived ... he must do so without any genuine claim to any right to do the depriving"[222]. Some of the arguments advanced in this appeal appear to rest on the proposition that this description of what was required for dishonesty in *Salvo* was being propounded as a universal definition of dishonesty. I do not take that to have been the purpose of the judges. Nonetheless, that is where authority rested in Victoria at the time when the decision in *Ghosh* was delivered[223].

Review 395 at 397-399; Smith, "Commentary on *R v Feely*" [1973] *Criminal Law Review* 192.

218 Campbell, "The Test of Dishonesty in *R v Ghosh*" (1984) 43 *Cambridge Law Journal* 349 at 359.

219 [1980] VR 401, per Murphy J and Fullagar J; McInerney J dissenting. *Salvo* was a case involving obtaining property by deception in breach of the *Crimes Act* 1958 (Vic), s 81.

220 [1981] VR 633 (*Crimes Act* 1958 (Vic), s 81).

221 [1981] VR 783 (*Crimes Act* 1958 (Vic), ss 74, 81).

222 [1980] VR 401 at 426 per Fullagar J.

223 *R v Brow* [1981] VR 783 at 788-789; *R v Bonollo* [1981] VR 633 at 635, 644-645.

127 After *Ghosh*, it became necessary for the Victorian courts to decide, in cases involving crimes of dishonesty, whether to persist with the approach adopted in *Salvo,* and to extrapolate it to a universal test, whether to follow *Ghosh* or whether to strike out on a new course. In the result, the approach in *Salvo* has been maintained; but it has been restricted to offences based on the *Theft Act* provisions of the Victorian *Crimes Act.* In other cases involving dishonesty, including offences against the Act such as conspiracy to defraud, the *Ghosh* test has been expressly or impliedly endorsed[224]. Not only has this occurred in Victoria. It has also happened in other States of Australia[225]. On the other hand, decisions of courts in New South Wales[226] and in the Australian Capital Territory[227] have declined to follow *Ghosh* in cases involving both non-federal and federal offences. Through all of these cases it has been assumed that a judge in Australia, presiding over a jury trial, is duty-bound to endeavour to assist the jury on the meaning of the element of dishonesty where this is an ingredient of the offence. The New South Wales courts, with fair consistency, have regarded the *Ghosh* test as "an unreliable guide as to what constitutes 'dishonesty'"[228]. Other Australian courts have tended to follow *Ghosh* in most cases.

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224 *R v Edwards* [1988] VR 481 at 489; cf *R v Smart* [1983] 1 VR 265 at 294-295.

225 In Queensland see *R v Maher* [1987] 1 Qd R 171 at 186-187 (conspiracy to defraud the Commonwealth); *R v Laurie* [1987] 2 Qd R 762 at 763 (dishonest application of property); *R v Allard* [1988] 2 Qd R 269 at 270-271, 276-277 (dishonest application of property); *R v Harvey* [1993] 2 Qd R 389 at 413-414, 437-439 (dishonest application of property).
In South Australia see *R v Aston and Burnell* (1987) 44 SASR 436 at 440 (conspiracy to defraud the Commonwealth); *R v Karounos* (1994) 63 SASR 451 at 485 (conspiracy to defraud at common law); *Weinel v Fedcheshen* (1995) 65 SASR 156 at 172-173 (dishonestly obtaining by false pretences).
In Western Australia see *Cornelius & Briggs v The Queen* (1988) 34 A Crim R 49 at 74-75 (conspiracy to defraud the Commonwealth); *R v Clark and Bodlovich* (1991) 6 WAR 137 at 150 (creating a document with intent to defraud); *Bond v The Queen* (1992) 62 A Crim R 383 at 405-406 (fraudulently inducing dealing in securities); *Carter v The Queen* unreported, Court of Criminal Appeal of Western Australia, 26 September 1997 at 156-158 (conspiracy to defraud).
In the Federal Court see *Einem v Edwards* (1984) 12 A Crim R 463 at 470-471 (conspiracy to defraud the Commonwealth).

226 *R v Love* (1989) 17 NSWLR 608 at 614-615; *Condon v The Queen* (1995) 83 A Crim R 335 at 346.

227 *Mattingley v Tuckwood* (1989) 88 ACTR 1.

228 *R v Love* (1989) 17 NSWLR 608 at 614.

128 The Officers' Committee developing a model criminal code for Australia have acknowledged the "strong philosophical disagreements"[229] reflected in the foregoing debates. In apparent resignation, rather than with enthusiasm, the officers have concluded that what they described as the "*Feely/Ghosh* test" was "the best that the law can do"[230]:

> "In view of the conflict in the authorities and the diversity in the various Australian jurisdictions, some common test has to be laid down in the *Model Criminal Code*. A very clear majority of submissions favoured the *Feely/Ghosh* test ... although this was not without some strong contrary submissions."

129 Some of the same debates which have emerged about this subject in Australia are also reflected in judicial decisions in New Zealand[231] and Canada[232]. In New Zealand, the Court of Appeal has refused to follow *Ghosh,* holding that, in order to prove that a person had acted "fraudulently" contrary to the provisions of the *Crimes Act* creating the offence of fraudulent misapplication of moneys[233], "it must be shown that he acted deliberately and with knowledge that he was acting in breach of his legal obligation"[234]. As in the case of the offence of conspiracy to defraud, the New Zealand Act did not expressly incorporate the notion of dishonesty into the offence of fraudulent misapplication. It was imported simply because it was part and parcel of the fraud which is inherent as an element of the offence.

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229 Commonwealth, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code. Chapter 3: Theft, Fraud, Bribery and Related Offences. Final Report* (1995) at 27.

230 Commonwealth, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code. Chapter 3: Theft, Fraud, Bribery and Related Offences. Final Report* (1995) at 27-29.

231 *R v Williams* [1985] 1 NZLR 294 at 307-308 where the Court declined to apply *Ghosh.*

232 *R v Lacombe* (1990) 60 CCC (3d) 489 at 492-495; *R v Zlatic* (1991) 65 CCC (3d) 86 at 94; cf *R v Black and Whiteside* (1983) 5 CCC (3d) 313 at 318-319.

233 *Crimes Act* 1961 (NZ), ss 222, 224.

234 *R v Williams* [1985] 1 NZLR 294 at 308.

Resolving the differences in judicial authority

130 As the foregoing review of authority and analysis demonstrate, the resolution of the problem presented by this appeal is by no means easy. No holding of this Court determines the matter. Such authority as exists in the several jurisdictions of Australia and overseas, demonstrates a sharp division between those who are persuaded to the correctness and utility of the *Ghosh* approach to dishonesty and those who are not. The current state of diversity of Australian judicial opinion is obviously unsatisfactory. Particularly is this so in the case of the approach that is to be taken to dishonesty where it is an ingredient in a federal offence. That approach should not differ, depending upon the jurisdiction in which the trial is had. The quandary presented has not been resolved by the Parliament. On the contrary, the Act still leaves the question to be determined in accordance with the common law[235].

131 Whilst it would be preferable for a legislative solution to be offered, and whilst work to that eventual end has been performed on the Model Criminal Code, it would be unrealistic to postpone the resolution of the question in this appeal in the hope that legislation will shortly ensue. In expressing the best solution which the common law provides, it is not inappropriate to take into account the work that has been performed on the Model Criminal Code. As I have said, the drafters favour the adoption of the "*Feely/Ghosh* test", not apparently regarding as important the differences between what was recommended in *Feely* and what was done in *Ghosh*. However, there are important differences between the exercise by the Officers' Committee on a model criminal code and the function of this Court in declaring the common law in Australia. Necessarily, the officers working on the Model Code have been obliged to pay close regard to the consensus of official opinion in the several Australian jurisdictions, that being a matter pertinent to the prospects of adoption of the legislative code which they will eventually recommend[236]. This Court, unless constrained by authority, is obliged to derive any new principle in a different way. It must take into account past decisions on analogous matters and evaluate any applicable considerations of legal principle or legal policy[237].

132 Most serious crimes of dishonesty are still tried in Australia before a jury. This feature of the mode of trial makes it specially important, as this Court has

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235 The Act, s 4.

236 Commonwealth, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code. Chapter 3: Theft, Fraud, Bribery and Related Offences. Final Report* (1995) at 29.

237 *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 252.

repeatedly recognised, to avoid wherever possible, over-subtle distinctions and differentiations and to adopt legal standards which are readily comprehensible, easily applied, capable of simple explanation to juries by judges and, in matters of fundamental principle which are unaffected by statutory disparities, as uniform as possible throughout the nation[238]. One special reason for adhering to the simple concept of acts and intentions is that this can be readily explained to, and understood by, a jury. Excessive subtlety may not be understood. Differentiation between the essential notion of dishonesty as an ingredient of criminal offences, whether express or implied, does not appear to be justified simply because, in some contexts, the word is used in an adverbial or adjectival form and in others as a noun. Furthermore, differentiation, such as now arises in the State of Victoria, in the judicial explanation of dishonesty, where that concept is relevant to both federal and State offences, is a sure formula for mistakes in judicial directions, confusion on the part of the jury or both. To resolve these differences, this Court should return to basic principle.

The fundamental principle of subjective intention

133 Save for a limited number of exceptional cases[239], the concern of the criminal law in Australia is ordinarily addressed in each offence not just to the conduct of an accused but also to his or her subjective intention or belief. This is a fundamental feature of our criminal law. Stephen J in *R v O'Connor*[240] observed:

> "For criminal liability to be incurred (cases of strict liability and culpable negligence always apart) civilised penal systems have, in modern times, insisted that the accused should be shown to possess a blameworthy state of mind. As Stephen J pointed out in *R v Tolson,* 'The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed ...'. (The reference to proof of absence must now, of course, be read in the light of *Woolmington v Director of Public Prosecutions.* The mental element that must be present is a state of mind such as Lord Simon described, in *Majewski,* as 'stigmatised as wrongful by the criminal law': it is that state of mind which, when compounded with prohibited conduct, constitutes the particular offence. As Dickson J said in *Leary v The Queen,*

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238 *Zecevic v Director of Public Prosecutions (Vict)* (1987) 162 CLR 645 at 665; *R v Barlow* (1997) 188 CLR 1 at 32.

239 Such as crimes of negligence, eg manslaughter by criminal negligence, or offences of strict liability.

240 (1980) 146 CLR 64 at 96-97 (citations omitted). See also at 79-80 per Barwick CJ.

> 'Society and the law have moved away from the primitive response of punishment for the actus reus alone'. Thus in *Bratty v Attorney-General (Northern Ireland)* the Lord Chancellor, in describing 'the overriding principle, laid down by this House in *Woolmington's Case*' said, 'that it is for the prosecution to prove every element of the offence charged. One of these elements is the accused's state of mind; ... if, after considering evidence properly left to them by the judge, the jury are left in real doubt whether or not the accused acted in a state of automatism, it seems to me that on principle they should acquit because the necessary means rea - if indeed the actus reus - has not been proved beyond reasonable doubt'."

134 The foregoing basic principle requires juries (or where relevant another tribunal of fact) to determine the intention or belief of the accused at the time of the criminal act in order to judge whether the offence has been established[241]. Obviously, this requirement presents certain difficulties. Absent a comprehensive and reliable confession, it is usually impossible for the prosecution actually to get into the mind of the accused and to demonstrate exactly what it finds was there at the time of the criminal act. Necessarily, therefore, intention must ordinarily be inferred from all of the evidence admitted at the trial[242]. In practice this is not usually such a problem. But the search is not for an intention which the law objectively imputes to the accused. It is a search, by the process of inference from the evidence, to discover the intention which, subjectively, the accused actually had. Thus in *He Kaw Teh v The Queen*[243], Gibbs CJ remarked that:

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241 The common law in Australia draws no distinction between crimes of "basic intent" and crimes of "specific intent": *R v O'Connor* (1980) 146 CLR 64 at 81-85, 91-92, 111. Contrast the approach taken in England: *R v Morgan* [1976] AC 182 at 216-217; *R v Majewski* [1977] AC 443 at 478-479; cf *Director of Public Prosecutions v Beard* [1920] AC 479 at 504. However, where intoxication is involved, the dichotomy has been introduced by legislation. See for example *Criminal Code Act* 1995 (Cth), Schedule, cl 8.2(1); *Crimes Act* 1900 (NSW), s 428B.

242 *Woolmington v The Director of Public Prosecutions* [1935] AC 462 at 481.

243 (1985) 157 CLR 523 at 534. See also at 592 per Dawson J. This Court has consistently upheld the general rule that "a person is not *criminally responsible* for an act which is done independently of the exercise of his will": *Hardgrave v The King* (1906) 4 CLR 232 at 237 per Griffith CJ (emphasis added); cf *Thomas v The King* (1937) 59 CLR 279 at 309 per Dixon J; *Ryan v The Queen* (1967) 121 CLR 205 at 216 per Barwick CJ; *R v O'Connor* (1980) 146 CLR 64 at 80 per Barwick CJ, at 96-97 per Stephen J.

> "[I]f guilty knowledge is an element of an offence, an honest belief, even if unreasonably based, may negative the existence of the guilty knowledge, and thus lead to an acquittal."

135 Dishonesty may be an element of an offence, either expressly (as in the *Theft Act* offences in Victoria) or inherently (as here, because the conspiracy alleged is of a particular character, viz one to defraud). The absence of the ingredient of dishonesty, even if that absence is, objectively speaking, unreasonably based, will negative the existence of dishonesty and justify a verdict of acquittal. Because the tribunal deciding such matters, whether jury or not, can be counted on to avoid the extremes of gullibility and naivety, that tribunal can safely be expected to apply what, for want of a better expression, amounts to "the current standards of ordinary decent people"[244]. But this is an expectation based upon the nature, composition and functions of the decision-maker. It is not based upon a legal requirement that the decision-maker, jury or otherwise, must apply to the facts an objective standard, invented as a fiction and resting on a presumption that it is possible to discover the "current standards of ordinary decent people" or the "ordinary standards of reasonable and honest people"[245] separately from the standards of the decision maker.

136 To the extent that an accused puts forward idiosyncratic, bizarre, eccentric or peculiar beliefs to support an assertion of a want of dishonesty, such considerations go, in my opinion, only to the plausibility of the accused's evidence[246]. If the tribunal of fact accepts the evidence and it sustains an absence of dishonesty at the relevant time, it will sustain an acquittal where dishonesty is an essential ingredient of the offence. Fear of hordes of modern Robin Hoods, galloping into the court rooms of the nation, in company with anti-vivisectionists, environmentalists and other people affirming minority beliefs (so often raised as a spectre in these cases) should neither be exaggerated nor overstated.[247]

137 The injection of an objective criterion as contemplated by the ruling in *Ghosh* cuts across one of the basic principles of our criminal law. Without the specific authority of Parliament, the courts should not invent such an exception. To do so is to countenance the punishment of an accused on the basis of a criminal intention

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244 As Lawton LJ said in *R v Feely* [1973] QB 530 at 538.

245 *R v Ghosh* [1982] QB 1053 at 1064.

246 *R v Lawrence* [1997] 1 VR 459 at 467 per Callaway JA.

247 This was also the answer given by Barwick CJ in *R v O'Connor* (1980) 146 CLR 64 at 79 to the suggestion that juries would be too readily persuaded to an acquittal if evidence of the result of self-induced intoxication, particularly by drugs other than alcohol, were allowed; cf *R v O'Connor* [1980] VR 635 at 647 per Starke J.

derived from a fiction based on objective standards rather than on the foundation of the accused's actual intention, subjectively held at the time of the criminal act charged. Such a departure from principle could certainly be achieved by statute. No doubt it would be applauded by some. But it is out of harmony with one of the most fundamental concepts – perhaps the most fundamental idea - of the criminal law of this country. If such a principle were to be adopted it would have to be done by a Parliament and not by a court declaring the common law in Australia.

138 The appellant urged this Court, in relation to the offence of which he stood charged, to return to the approach accepted by the Victorian Full Court in *Salvo*. In that case, the judges in the majority addressed attention to two considerations in giving meaning to the word "dishonestly" where expressly appearing in the *Theft Act* provisions of the Victorian *Crimes Act.* The first was the need to focus the inquiry upon what "the accused himself in fact believed"[248]. The second was to address whether the accused believed that "he had a legal right in all the circumstances"[249]. In my opinion, in giving attention to what the accused in fact believed, the majority in *Salvo* correctly expressed the test for the ascertainment of the presence or absence of the ingredient of dishonesty. And this is so whether that ingredient is expressly stated by statute or is inherent in the definition of the offence created by the common law. However, the reference to the existence of a claim of right, whilst doubtless apt to the facts of that case did not (nor did it purport to)[250] exhaust the circumstances where dishonesty might be negatived. The broader statement expressed by King CJ in *Kastratovic*[251] would, in my view, have application to a wider range of cases:

> "In all cases, the element of intent to defraud connotes the intention to produce a consequence which is in some sense detrimental to a lawful right, interest, opportunity or advantage of the person to be defrauded, and is an intention distinct from and additional to the intention to use the forbidden means."

139 Whilst the notion of defrauding will commonly address attention to the use of forbidden means, it is not confined to a consideration of the means. In certain cases some, at least, of the means used may have been perfectly legal. The stain

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248 *R v Salvo* [1980] VR 401 at 423 per Murphy J; cf at 426 per Fullagar J.

249 [1980] VR 401 at 420 per Murphy J, at 432 per Fullagar J.

250 [1980] VR 401 at 423 per Murphy J who confined his remarks to the position "in the present case".

251 (1985) 42 SASR 59 at 62-63.

of fraud may arise from the object which the perpetrator dishonestly set out to achieve.

140 I have no more temerity to attempt an exhaustive definition of the meaning of "defraud", or of dishonesty, than Viscount Dilhorne could evince in *R v Scott*[252]. Nor is it necessary to do so. In the present case, the proper instructions to the jury would have involved a review of the essential ingredients of the charge of conspiracy to defraud. It would have obliged the judge to inform the jury that one ingredient which the prosecution had to prove was that the appellant, in concert with the other persons named, had set about to deprive the Commissioner of Taxation dishonestly of the taxation owing to him by the client. This direction would have been followed by a reminder of the evidence pertinent to the respective cases of the prosecution and the accused, much as the primary judge gave in this case. But instead of telling the jury, as *Ghosh* and its Australian acolytes required, that they had to ascertain whether the appellant had acted dishonestly by reference to "the ordinary standards of reasonable and honest people", it would have been the judge's duty to focus the minds of the jury on what the appellant himself in fact believed as to the means chosen to achieve the agreement found. If he believed that he had a legal right to act as he did, if he believed that that he was not acting in breach of any legal obligations or if he had no dishonest intention to act in a way to impede the Commissioner of Taxation in the lawful collection of tax from the client, the means chosen to achieve the purposes of the agreement would lack the element of dishonesty necessary to establish its character as one of *defrauding* the Commissioner. The search is for the accused's intention as well as for his actions. It was not just the intention to enter an agreement with the alleged co-conspirators but the intention to enter an agreement intended to be achieved by dishonest means which alone would warrant criminal punishment. Conclusions on the foregoing questions unfavourable to the accused, reached to the requisite standard, would justify conviction of the appellant.

The proviso is inapplicable

141 It follows from these conclusions that the charge given to the jury in the trial of the appellant in this case was erroneous. It introduced misdirections as to the way in which they were to approach an ingredient of the offence of conspiracy to defraud, viz an agreement on the part of the appellant with others to cause loss to the Commissioner of Taxation by dishonest means[253]. The appellant was entitled to have the jury pass upon the evidence, correctly instructed on the important ingredients of that offence. The objective considerations, as required by *Ghosh* and contained in the primary judge's instruction, may have affected the jury's

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252 [1975] AC 819 at 839.

253 *R v Scott* [1975] AC 819 at 841. See also at 839.

approach to the consideration of the subjective beliefs, intentions and objectives of the appellant.

142 It is impossible to know how, properly instructed, the jury might have responded to the appellant's evidence. Whilst it is true that his principal defence was that he did not enter into a conspiracy at all, he was entitled, if that defence were rejected, to have the jury consider the issue of the alleged dishonesty with the proper legal test in mind. As the judge's charge did not ensure that that happened, the appellant suffered a miscarriage of justice. He lost a real chance of acquittal[254]. The case is therefore not one for the application of the proviso. It is true that, on the facts, the prosecution case against the appellant was extremely strong. Objective evidence would clearly have supported inferences of dishonesty which the prosecution invited the jury to draw. But the accused was entitled to have the jury accurately instructed on such an important, even central, ingredient of the offence. This did not occur.

143 The Crown argued that the introduction of objective considerations was not unknown in particular contexts of the criminal law. Thus, on the issue of provocation the question is not resolved by reference only to the subjective beliefs of the accused. Consideration is given to the response of an ordinary person or "an ordinary person in the position of the accused"[255]. It was argued that juries are accustomed to receiving and acting upon judicial instructions addressed to such considerations. All of this is true. However, the position in such cases is distinguishable on a number of grounds. First, the introduction of an objective element in provocation can be traced to very old principles of the common law, elaborated, historically, before the universal importance of the subjective intention of the accused was accepted as a general rule. As well, in Australia, the objective criterion is now commonly so stated in the applicable *Crimes Act* or Code. Furthermore, in a case such as provocation, what is in issue is an amelioration of the charge of criminal conduct. Here, the issue is the definition of one of the elements of the offence itself. Now confronted by the problem, the Court is obliged to solve it by resort to fundamental principle. Dishonesty of its essential nature connotes conscious wrongdoing. It is not dishonesty by the standards of other persons but by the appreciation and understanding of the accused personally.

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254 cf *Mraz v The Queen* (1955) 93 CLR 493 at 514; *R v Storey* (1978) 140 CLR 364 at 376; *Quartermaine v The Queen* (1980) 143 CLR 595 at 600-601; *Wilde v The Queen* (1988) 164 CLR 365 at 372-373; *Whittaker v The Queen* (1993) 68 A Crim R 476 at 484; *R v Jones* (1995) 38 NSWLR 652 at 659.

255 See for example *Crimes Act* 1900 (NSW), s 23(2)(b); cf *Green v The Queen* (1997) 72 ALJR 19; 148 ALR 659.

Conclusion and orders

144 At one stage the appellant argued that this Court should substitute a verdict of acquittal on the first count for the verdict which the jury returned. That submission was entirely misconceived. This Court, which has neither seen nor heard the witnesses, could not properly reach any conclusion on the appellant's protestations that he had only acted in his capacity as the client's solicitor and had not been dishonest. Such matters would have to be passed upon by a jury. However, it should be a jury properly instructed as to what dishonesty means in this context, as an element of the offence charged. This is what was missing from the first trial. The jury were deprived of the instructions which the law required. For all this Court knows, if the jury had been properly directed, they might have concluded that the appellant was naive, even stupid perhaps, but not dishonest and thus not a party to the conspiracy to defraud the Tax Commissioner. It would follow that the appeal should be allowed, the conviction quashed and a new trial ordered.

145 I have already indicated my disagreement with the conclusions of McHugh J (with whom Gummow J concurs). From the foregoing it will be plain that I also cannot agree with the opinion of Toohey and Gaudron JJ that the question whether the means used to effect the conspiracy are to be characterised as dishonest is to be answered by the application of the standards of ordinary, decent people. However, clearly, the opinions of Toohey and Gaudron JJ are much closer to my own, in that their Honours accept that the offence of conspiracy to defraud the Commonwealth, properly analysed, involves dishonesty at two levels and a jury must be so satisfied. As this Court is evenly divided on the applicable legal test, as there is a clear majority for dismissing the appeal which my opinion cannot affect and as it is essential that the Court should provide clear instruction to those who have the responsibility of conducting criminal trials, whilst preferring my own opinions I withdraw them. For the purposes of procuring a holding on the issues argued in this appeal, I concur in the opinions expressed by Toohey and Gaudron JJ on the point of difference between them and McHugh J and Gummow J.

146 The appeal should therefore be disposed of as Toohey and Gaudron JJ propose.